S. HRG. 98-676

THE CASH DISCOUNT ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON CONSUMER AFFAIRS

OF THE

COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

THE CASH DISCOUNT ACT AND PROPOSALS TO EXTEND THE BAN ON CREDIT CARD SURCHARGES WHICH EXPIRES ON FEBRUARY 27, 1984

FEBRUARY 7, 1984

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THE CASH DISCOUNT ACT

TUESDAY, FEBRUARY 7, 1984

U.S. SENATE,
COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS,
SUBCOMMITTEE ON CONSUMER AFFAIRS,
Washington, D.C.

The subcommittee met at 9:30 a.m. in room SD-538, Dirksen Senate Office Building, Senator Slade Gorton (chairman of the subcommittee) presiding.

Present: Senators Gorton and Proxmire.

OPENING REMARKS OF SENATOR GORTON

Senator GORTON. On February 27, 1984, title II of the Cash Discount Act, commonly referred to as the ban on credit surcharges, will expire unless Congress takes action to extend the life of that title.

The purpose of this hearing is to explore alternatives relating to the expiration of the ban on credit surcharges. Those alternatives include making the ban on surcharges permanent, allowing the expiration to occur while opposing conditions preclude the possibility of certain results which would not be in the consumer interest, and extending the ban for some fixed term while the issue is once again studied.

I look forward to hearing the testimony of today's witnesses. In my view, it is appropriate to have the users of credit pay the cost of that credit. I'm certain that most of the witnesses will agree with me on that issue. Of course, the more difficult issue before us is how best to accomplish that goal without imposing certain other ills on the credit system. An abrupt end on the ban to credit surcharges without a fair review of the consequences may well lead to consumer confusion and invite a few to engage in unfair trade practices.

Alternatively, Congress has repeatedly delayed making a final decision on this issue when it may well be time for us to commit to do so.

With that, I welcome our first witness, the Honorable Nancy H. Teeters of the Federal Reserve Board. Governor Teeters, it's both a pleasure to have you here and unfortunate that I must acknowledge that this may be your last appearance on behalf of the Board. I understand that your term expired on January 31, and that you have nonetheless consented to appear today to assist the committee on this time sensitive issue. I'm sure that my colleagues join me in thanking you for your good work on the Board and particularly for

your continued interest and work on issues of concern to the consumer.

Mrs. TEETERS. Thank you very much.

OPENING STATEMENT OF SENATOR PROXMIRE

Senator PROXMIRE. I have a short opening statement.

Mr. Chairman, I am delighted to hear you say that the users of credit should pay the cost of credit and I couldn't agree with your more.

For the fourth time in 8 years, the Congress is being asked to prohibit retail merchants from imposing a surcharge on credit card customers. In effect, we are being asked to continue a form of price regulation on the retail community. We all know what a disaster price controls were the last time they were invoked by President Nixon, especially on retailers.

What I find absolutely astonishing is that the demand for price controls is not coming from wild-eyed consumer advocates hostile to our free enterprise system. On the contrary, consumer groups are opposed to governmental regulation in this area. Those who are calling for the continuation of price controls are the very groups who have generally opposed price controls and who have advocated a Federal law nullifying State usury ceilings--the American Bankers Association and others in the lending community.

What accounts for this curious turnabout? I think the explanation is fairly simple. The Nation's giant credit card companies want to perpetuate the myth that there really is a free lunch—that consumers can get up to 60 days of free credit when they use their credit cards to pay for merchandise. However, as even the most obtuse student of economics 101 knows, there is no such thing as a free lunch. Neither is there free credit.

Mr. Chairman, when you or I buy something with a credit card we get a bill at the end of the month and then we have another 30 days before we are hit with a finance charge. During this time, we have the use of the money. It is like an interest-free loan. This is the so-called free lunch.

But it isn't really free. Someone must pay for this credit. Initially, the merchant pays in the form of a merchant discount. When he sends our sales slip to the credit card company, he only gets back an average of 97 cents on the dollar. But most merchants operate on a very thin margin and few can afford to absorb the 3-percent charge. So what do they do? They increase their prices to cover their costs. Thus, everyone, cash customers as well as credit card customers, wind up paying for the free lunch.

If practically everyone used credit cards, this wouldn't be so bad. But many people can't qualify for credit cards or don't want to use them. So what we have is a system where the poor subsidize the rich to the tune of $6 billion a year. This is the cost of the merchant discount reflected in retail prices.

Credit card companies are opposed to surcharges because they are worried that some credit card users might pay with cash if they had to pay a surcharge every time they used their credit card. I say let the market decide whether consumers pay by cash or by credit card. Retail merchants should not be told by the Federal

Government that they can't assess a charge on credit card customers if they think it makes business sense. Why should the Federal Government use its powers to help perpetuate a system inherently unfair to low-income consumers? What public policy purposes are served by protecting VISA, Mastercharge, and American Express from the rigors of the competitive marketplace?

I say it is high time we end governmental interference in the marketplace and that we allow the credit card surcharge ban to die a quiet death. I just can't, for the life of me, understand how the Federal Government can tell a merchant that he cannot make a charge to a customer who by his choice, by the customer's choice, has selected a method which increases the cost to that merchant. This just seems to me to be wrong in every sense.

In closing, I would like to say that this is the last time Governor Teeters will be testifying before us, as the chairman so graciously said. She will be leaving the Board shortly, which I very much regret. I think you've done an outstanding job and I will be sad to lose your wisdom and strong proconsumer viewpoint from the Board, too. I think you have served with great credit and I'm going to miss you.

Mrs. TEETERS. Thank you.

Senator GORTON. At this point I would like to submit a statement for the record by U.S. Representative Frank Annunzio, from the State of Illinois.

[Statement of Representative Annunzio follows:]

STATEMENT OF THE HONORABLE FRANK ANNUNZIO BEFORE THE SENATE SUBCOMMITTEE ON CONSUMER AFFAIRS, TUESDAY, FEBRUARY 7, 1984

Mr. Chairman, thank you for giving me the opportunity to present my views before this subcommittee. As you know, the prohibition against surcharges was imposed in 1976, extended in 1978, and extended again in 1981. Now that the ban is up for reconsideration again this year, I would like to urge this subcommittee to approve first, the temporary July 31 extension of the credit card surcharge prohibition, and second, a permanent extension of the ban on surcharges.

Extending the credit card surcharge prohibition until July 31 will give the Congress time to consider the matter with full and meaningful hearings. It will give both opponents and proponents of the surcharge ban an opportunity to fully present their cases. Furthermore, the Federal Reserve Board has conducted a study on credit card surcharges. Due to an extremely crowded legislative schedule, no hearings have been held on that study. I think in-depth hearings on the Federal Reserve Board study are necessary. The temporary extension bill passed by the House takes no position on the surcharge issue. Rather, the bill provides for an extension so that Congress can legislate on the issue with full hearings.

Mr. Chairman, I am totally opposed to credit card surcharges. As our credit system stands now, merchants are permitted to offer discounts to customers who choose to pay cash for their purchases. A discount is a reduction from the regular price of an item and is used to encourage consumers to purchase goods for cash instead of credit. A discount does not increase the regular price of the item being sold. By comparison, a surcharge is an extra charge added to the price of an item which raises the cost of that item for credit card customers.

To illustrate, suppose a shirt is advertised for $20. When the customer selects the shirt and offers cash in payment, the merchant gives a discount, and the customer has to pay only $19. Under a surcharge program, when the customer presents a credit card to the merchant, he might have to pay $21. The problem with a surcharge is that the merchant advertised the shirt at a given price, and having lured the buyer into the store, charged an additional fee when the consumer presented a credit card.

The confusion and frustration of consumers as they try to cope with such a system will be enormous. We cannot allow merchants to offer regular prices, sur-

charges, and discounts. If we do, we will see catastrophic results. A consumer will see advertised prices on items and still not know how much they cost.

Surcharge advocates claim that cash customers are the ones who pay for the convenience of credit card customers because merchants pass the costs of credit cards to all customers. This argument sounds attractive, but there is no concrete evidence to justify this belief. The Federal Reserve Board, in the study "Credit Cards in the U.S. Economy," could find no reliable data to support the claim that merchants raise prices on all goods and to all customers in order to attract credit customers.

The presence of credit cards in our economy has little impact on the overall price actually charged by a merchant for a particular item. The Federal Reserve reports that many merchants regard credit card costs as incidental to their business. Merchants must pay a certain percentage of all goods to cover costs for cash and check transactions. While merchants often pay credit card issuers up to 5 percent of the purchase price of each item, merchants must pay for cash and check transactions as well. Since only 15 to 30 percent of all sales are conducted with credit cards, the actual impact of credit cards on consumer purchases is minimal. The actual costs of a credit card purchase borne by cash-paying customers is less than 1 percent. For many merchants, the cost is less than one half of 1 percent.

In the Federal Reserve's study of retailer attitudes, retailers were asked whether they thought that a credit card surcharge was a good idea or a bad idea compared to discounts for cash. Seventy-one percent of all retailers responding to the survey replied that a surcharge is a bad idea.

Among gasoline retailers, 67 percent expressed disapproval of a surcharge. In other words, two out of three gasoline dealers oppose surcharges. While I do not find this surprising, it may come as something of a shock to those in the gasoline retail industry who have claimed that dealers would rather be able to impose surcharges upon consumers.

Among other retailers, the opposition to surcharges is even greater. Seventy-two percent of all other retailers oppose surcharges. Strong opposition exists regardless of the size of the retailer. Of those retailers with sales volume in excess of $100 million, 74 percent thought surcharges were a bad idea. Retailers with volume between $10 million and $100 million preferred cash discounts over surcharges by four to one, with 80 percent opposing surcharges.

Allowing the credit card surcharge prohibition to expire would create a distressful situation. Consumers would be confused by the array of cash, credit, and regular prices offered. And prices would not necessarily be lower than prices now. As is evidenced by the survey conducted by the Federal Reserve, merchants would not benefit from surcharges and, in fact, do not want the credit card surcharge prohibition to expire.

Our current system of encouraging cash discounts and banning credit card surcharges has been in place and working for over half a decade. There is no reason to disrupt our present successful system. Congress has approved the use of cash discounts and the ban on surcharges three times previously, and those laws operate efficiently. It would be a dire mistake to disrupt the system which is already established by failing to extend the surcharge prohibition.

Senator GORTON. Governor Teeters.

Mrs. TEETERS. If I may, Mr. Chairman, I'd like to submit the full statement for the record and summarize.

Senator GORTON. It will be included in the record.

Mrs. TEETERS. Thank you very much.

STATEMENT OF NANCY H. TEETERS, GOVERNOR, FEDERAL RESERVE SYSTEM, ACCOMPANIED BY CHARLES LUCKETT, ECONOMIST, DIVISION OF RESEARCH AND STATISTICS; AND GERALD HURST, ATTORNEY, DIVISION OF CONSUMER AND COMMUNITY AFFAIRS

Mrs. TEETERS. I am pleased to appear before you this morning to present the views of the Board of Governors on this issue and will briefly summarize my statement.

The principal reason for the temporary nature of the surcharge prohibition was to allow Congress to study the issue more thoroughly. When the prohibition was last extended in 1981, the Board

was directed to prepare a report on the effects of credit cards so that Congress would have a basis for making a permanent decision regarding surcharges.

The Board submitted its report in July 1983. The study confirms that credit card transactions cost merchants more than cash sales, and that cash customers subsidize credit customers to some extent. The report also indicates that discount programs have become popular in at least one industry, but are not as widespread in the marketplace as proponents of the legislation probably hoped. Finally, a sizable percentage of the retailers surveyed look with favor on such programs.

Although many options are now available to Congress, the Board favors allowing surcharges, thus giving merchants the flexibility to choose either a discount or surcharge and possibly promoting more widespread use of two-tier pricing. In addition, the Board recommends that the amount of the price differential that is excluded from State and Federal law be limited to 5 percent of the cash price and limited to credit card transactions.

RECOMMENDATION OF SURCHARGES AND DISCOUNTS BE PERMITTED

Our recommendation that both surcharges and discounts be permitted is based on the proposition that the two are fundamentally equivalent, as well as on a number of practical considerations. First, two-tier pricing through discounts ordinarily would result in essentially the same level of credit and cash prices as would a surcharge program.

Second, allowing two alternative methods of pricing may provide merchants the flexibility they need to offer more of the two-tier pricing that Congress is trying to encourage. There is some indication that merchants may find discount programs to be too much trouble to administer or, due to the similarity between discounts and surcharges, merchants may be confused about what is a permissible discount and what is an illegal surcharge. The latter is evidenced by the many inquiries the Board has received about the distinction. The confusion, and the attendant uncertainty, could result in merchants choosing not to offer a discount instead of risking a violation of Federal law. If the lack of two-tier pricing is related to either or both of these factors, then there is some hope that permitting both pricing schemes might promote the result Congress originally hoped to achieve.

A third consideration concerns the possibility that allowing both types of two-tier pricing will lead to consumer confusion in a marketplace where some merchants offer discounts and others impose surcharges. While the possibility of some initial confusion exists—much like that which accompanied the introduction of discount programs at service stations—the Board believes that competition and the merchants' desire for customer goodwill would lead them to make clear to their customers what their pricing practices are. Furthermore, there is at least one type of problem with discount programs that would not exist with surcharges. There have been reports that cash-paying customers have not always received the discounts to which they were entitled; this has occurred, for exam-

ple, where customers believed that the posted price reflected the discount, when it in fact did not.

In addition to allowing both types of pricing systems, we urge Congress to make two other changes. First, we suggest that the amount of any price differential that is excluded from truth-in-lending requirements and State disclosure and usury laws be limited to 5 percent of the cash price of the property or service. Since this provision involves a tradeoff with the goals of truth-in-lending and State laws, we think some limits are appropriate. Furthermore, we think the 5-percent limit would not keep merchants from offering price differentials related to the extra cost of credit card transactions since the fee imposed by credit card companies on merchants, based on our study, is usually within the 5-percent limit. In addition, most discounts now being offered are in the neighborhood of 3 to 5 percent.

Second, we believe that the two-tier pricing provision should be limited to credit cards. The purpose of the original exception, in fact the only focus of the discussions over the years, was to provide a means to remove from the price charged to the cash customer the extra costs of credit card transactions. However, in 1981, Congress changed the language of the act to provide special treatment for discounts not only in credit card transactions but in all open-end credit transactions. The Board believes that since open-end credit transactions not involving a credit card do not generally result in merchant discounts, this may have been an unwarranted extension of the provision and could further undercut the accuracy of the truth-in-lending disclosures and the effectiveness of State laws.

The chart that I have brought along with me today sets out the current treatment of discounts and surcharges, the treatment they would be given if Congress takes no action and simply lets the surcharge prohibition expire, and the treatment of discounts and surcharges under the Board's recommendation. Thank you very much.

[The complete statement follows:]

Statement by

Nancy H. Teeters

Member, Board of Governors of the Federal Reserve System

I am pleased to appear before you this morning to present the views of the Board of Governors on the issue of whether the Truth in Lending Act should continue to prohibit merchants from charging higher prices to credit card purchasers than to cash purchasers through the use of a "surcharge."

As you know, the purpose of the Truth in Lending law, which was passed in 1968, is to provide for a uniform disclosure of the cost of credit to consumers through the identified "finance charge" and "annual percentage rate." As a result, the act originally required that any differential between the price charged in a cash transaction and that charged in a credit transaction be treated as a cost of credit and included in the finance charge and annual percentage rate.

This requirement, as well as state disclosure and usury laws, however, was viewed in subsequent years as an obstacle to merchants wishing to implement two-tier pricing systems for cash and credit card customers -- that is, establishing two prices for property or services, a lower price for customers paying cash and a higher price for customers paying with a credit card. Consumer groups argued that the fee imposed on merchants by credit card companies was being passed on in higher prices to all customers.1/ As a result, it was argued that cash customers were being forced to subsidize credit customers when they were required to pay the same price for an item. Two-tier pricing systems were thus viewed as potentially beneficial to consumers as a means of eliminating the subsidy.

1/ The charge assessed by a credit card company on a merchant's credit card transactions is often referred to as the "merchant discount." If a merchant accepts a credit card for a $100 purchase, for example, the merchant might be assessed a three percent fee, thus receiving only $97 when the transaction is processed by the credit card company.

Congress responded to this concern and sought to eliminate this subsidy by removing the Truth in Lending and state law obstacles to merchants offering lower prices to cash customers. It amended the federal act in 1974 to provide that discounts for cash need not be considered finance charges for purposes of Truth in Lending. There was, however, a great deal of uncertainty following Congress' action as to whether it intended to permit additions to prices for credit card customers (surcharges) as well as reductions in prices for cash customers (discounts). In response, Congress in 1976 prohibited the imposition of surcharges -- that is, adding an amount to the regular price of an item when it was sold to credit card customers.2/ At the same time, Congress responded to the concern that state disclosure and usury laws presented an obstacle to discount programs by preempting them to the extent those laws treated discounts as finance charges.

However, because of some uncertainty as to the effect of the surcharge prohibition, it was originally scheduled to expire on February 27, 1979. Subsequently, the expiration date was advanced, and the surcharge prohibition will now expire on February 27, 1984. The chart found in Attachment A summarizes the provisions of the current law and indicates the provisions that would apply after the expiration date, absent some action by Congress. The chart is also displayed at the side of the room.

2/ In amending the act Congress defined a discount as a reduction in the regular price and a surcharge as an addition to the regular price. The "regular price" was not cefined, however. In order to allow merchants to determine whether their programs involved discounts or surcharges, the Board by regulation defined "regular price." This definition was made part of the act in 1981.

The principal reason for the temporary nature of the surcharge prohibition was to allow Congress to study the issue more thoroughly. It wanted to determine whether there is, in fact, a higher cost associated with the use of credit cards; whether cash customers do, as a result, subsidize credit customers; and whether it is necessary to allow surcharges as well as discounts in order to eliminate any subsidization. When the prohibition was last extended in 1981, the Board was directed to prepare a report on the effects of credit cards so that Congress would have a basis for making a permanent decision regarding surcharges. The report was to discuss the impact of credit cards on the costs that merchants incur, on the pricing of goods and services, and on retail sales volume.

The Board submitted its report in July 1983. Appendix B contains a more detailed summary of the results, but these are the main findings:

- The costs to retailers of credit card transactions (including point-of-sale, security-related, and financial costs) are higher than the costs for other types of transactions. The extra cost is about 2 to 3 percent of the transaction amount.

- There is little evidence that credit card usage increases overall retail sales volume. Since credit cards are so widely accepted, retailers as a whole do not recover the added cost of credit card transactions through increased sales.

- The extra cost of credit card transactions (to the extent it is not recovered directly from credit card users) is reflected in retail prices. It appears that on average the price of a given item is increased by something less than 1 percent.

- About 25 percent of gasoline stations and 6 percent of other retailers offer discounts. Approximately 40 percent of all retailers surveyed believed that discounts for cash are "a good idea."

In finding that credit card transactions cost most retailers more than cash or check transactions, and that the additional cost is generally not offset by higher sales volume but is reflected in the price level, the report supports the conclusion that cash buyers, at least to some extent, subsidize credit card users when all customers pay the same price. The report estimates the typical size of the subsidy to be between 1/2 percent and 1-1/4 percent of the total price. Thus, it appears that the theory underlying Congress' attempt in 1974 to eliminate the subsidy of credit card users by encouraging two-tier pricing was correct. At the same time, the size of the subsidy may be smaller than many people had assumed, which may help to explain why relatively few retailers have seen fit to adopt two-tier pricing.

In summary, our studies confirm that cash customers subsidize credit customers to some extent. The report also indicates that discount programs have become popular in at least one industry, but probably are not as widespread in the marketplace as a whole as proponents of the legislation hoped. Finally, a sizable percentage of the retailers surveyed look with favor on such programs.

Although many options are now available to Congress, they fall into three categories. Congress could remove the special Truth in Lending rules for discounts and surcharges, thus requiring them both to be treated as finance charges; as a practical matter, this would probably eliminate the existing programs and ensure that new ones would not develop. It could make the surcharge prohibition permanent, thereby permitting continuation of most discount programs now in place, but without any good reason to expect more to be offered in the future. Finally, it could allow the surcharge prohibition to expire, thereby possibly promoting some additional two-tier pricing. The Board favors this third alternative, provided the surcharge or discount does not exceed 5 percent.

To make such programs work, the exemption from the truth in lending rules, both state and federal, and from state usury ceilings should be available to both programs.

Our recommendation that both surcharges and discounts be permitted is based on the proposition that the two are fundamentally equivalent, as well as on a number of practical considerations. First, while advocates of discounts have claimed that discount programs result only in price reductions for cash buyers, without penalizing credit card users, economic reality is such that prices generally will be restructured so that the "new" credit price is above -- and the discounted cash price only somewhat below -- the "old" single price. The Board's study indicates that if discount programs are to be economically feasible, most are likely to involve some increase in the price, from which discounts to cash customers are calculated. In fact, two-tier pricing through discounts ordinarily would result in essentially the same level of credit and cash prices as would a surcharge program. (This is discussed in more detail in Appendix C.)

Second, allowing two alternative methods of pricing may provide merchants the flexibility they need to offer more of the two-tier pricing that Congress is trying to encourage. Although 40 percent of the retailers surveyed by the Board considered cash discounts a "good idea," only 6 percent actually offered them. This low figure may mean that merchants find discount programs to be too much trouble to administer. Another possible explanation is that the similarity between discounts and surcharges causes merchants to be confused about what is a permissible discount and what is an illegal surcharge -- as evidenced by many inquiries the Board has received about the distinction.

This uncertainty may discourage merchants from risking a violation of federal law. If the lack of two-tier pricing is related to either or both of these factors, then there is some hope that permitting both pricing schemes might promote the result Congress originally hoped to achieve.

A third consideration concerns the claim made by some opponents of surcharges that allowing both types of two-tier pricing will lead to consumer confusion in a marketplace where some merchants offer discounts and others impose surcharges. While the possibility of some initial confusion certainly exists (much like that which accompanied the introduction of discount programs at service stations), we do not think the problem would be major since merchants would still be required to disclose their policies. In addition, the Board believes that competition and the merchants' desire for customer goodwill would lead them to make clear to their customers what their pricing practices are. Furthermore, there is at least one type of problem with discount programs that would not exist with surcharges. There have been reports that cash-paying customers have not always received the discounts to which they were entitled; this has occurred, for example, where customers believed that the posted price reflected the discount, when it in fact did not.

In addition to allowing both types of pricing systems, we urge Congress to make two other changes. First, we suggest that the amount of the price differential in any two-tier pricing system that is excluded from truth in lending requirements and state disclosure and usury laws be limited to 5 percent of the cash price of the property or service. Any price differential between cash customers and credit customers is a cost of credit and normally would be viewed as a finance charge. In this case, however, Congress chose to sacrifice some accuracy in the credit cost disclosures and the protection offered by state

usury laws in order to help eliminate subsidization of credit card users. Since this provision involves a trade-off with the goals of the Truth in Lending Act and state laws, we think some limits are appropriate. Furthermore, we think the 5 percent limit would not keep merchants from offering price differentials related to the extra cost of credit card transactions. The Board's study indicates that the fee imposed by credit card companies on merchants averages 3.1 percent (with an average of 4.1 percent for small businesses), well within the 5 percent limit. In addition, most cash discounts now being offered are in the neighborhood of 3 to 5 percent. Therefore, we believe that limiting the differential to 5 percent would avoid any major distortions of credit costs as a result of the finance charge exclusion without adversely affecting the provision's goal.

Second, we believe that the two-tier pricing provision should be limited to credit cards. The purpose of the original exception, in fact the only focus of the discussions over the years, was to provide a means to remove from the price charged to the cash customer the extra cost of credit card transactions. However, in 1981 Congress changed the language of the act to provide special treatment for discounts not only in credit card transactions, but in all open-end credit transactions. The Board believes that since open-end credit transactions not involving a credit card do not generally result in a "merchant discount," this may have been an unwarranted extension of the provision and could further undercut the accuracy of the Truth in Lending disclosures and the effectiveness of state laws. We therefore recommend that the special treatment offered two-tier price differentials be limited to credit card transactions.

31-956 O—84——2

The third column under both the "Discount" and the "Surcharge" sections of the chart shows the treatment that would be offered to all two-tier price differentials if the Board's recommended changes are made. Appendix D contains statutory language that reflects the recommendations.

I appreciate the opportunity to address the subcommittee and hope that our testimony will be of assistance in your efforts to deal with this difficult question.

	DISCOUNTS			SURCHARGES		
	Now	After 2/27/84	FRB Recommendation	Now	After 2/27/84	FRB Recommendation
1. LEGAL TO OFFER?	YES	YES	YES	NO	YES	YES
2. FINANCE CHARGE UNDER TRUTH IN LENDING?	NO	NO	NO (if 5% or less)	N/A	YES	NO (if 5% or less)
3. FINANCE CHARGE UNDER STATE LAW?						
• DISCLOSURES	NO	NO	NO (if 5% or less)	N/A	YES	NO (if 5% or less)
• USURY CEILINGS	NO	NO	NO (if 5% or less)	N/A	YES	NO (if 5% or less)

APPENDIX A

APPENDIX B

SUMMARY OF FEDERAL RESERVE BOARD'S CREDIT CARD STUDY*/

The fundamental thesis underlying the Cash Discount Act is that credit card transactions are more costly to retailers than cash or check transactions, and that the higher costs of credit cards are incorporated in the prices of goods and services paid by all customers, resulting in a subsidy of credit buyers by cash purchasers.

The most basic challenge to this view would be the assertion that, properly measured, transactions costs for credit cards do not differ from other means of payment, or that the magnitude of difference is negligible. Another counter-argument sometimes proposed to the subsidy thesis is that credit cards generate incremental sales for retailers, so that the additional profits thereby attributable to cards eliminate any need to recover the cost of credit cards in prices of goods and services. The Board's study addressed these issues, and also examined the current practices and attitudes of retailers toward offering discounts for cash.

Following a brief overview in Chapter 2 of the study describing the types of credit cards available and the incidence of their use among households, Chapter 3 examined the broad question of the impact of credit cards on sales of retailers. Many observers would argue that because consumers are enabled by credit cards to spend beyond the immediate limits of cash or checking account balances, they are more likely to make ill-considered purchases and, in general, to spend more and save less than they would in the absence of credit cards.

This idea was examined in two ways: first, through a survey of households on "impulse" purchases transacted by credit cards; and second, by

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*/ "Credit Cards in the U.S. Economy: Their Impact on Costs, Prices, and Retail Sales," July 27, 1983.

a review of available research on the link between credit cards and aggregate spending, on the grounds that any broad increase in spending induced by credit cards would be expected to boost aggregate consumption and to reduce the aggregate saving rate. However, neither the household survey nor the macroeconomic studies suggested that any strong, consistent relationship exists between credit cards and incremental sales among retailers as a group.1/ The survey found that many unplanned purchases were transacted by cash, and that many of those transacted through credit cards would likely have been undertaken even without access to a credit card. The limited amount of macroeconomic research available has failed to establish any measurable impact of credit cards on the aggregate saving rate.

Chapter 4 examined the costs associated with credit cards and other means of payment, and summarized a number of relevant studies. It also reported on the results of a survey of retailers conducted during the spring of 1983 concerning their perceptions of the relative costs of credit cards, cash, and checks. The weight of the evidence from the survey and other studies was that total net costs to retailers associated with credit cards -- including point-of-sale, security-related, and financial costs -- were in fact higher than for other types of transactions, typically by about 2 to 3 percent of the transaction amount, a figure which roughly corresponds to the average factoring or servicing fee paid by merchants to issuers of third-party credit cards (or the net credit department deficits of retailers that issue their own credit cards). For most

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1/ Whether card-honoring retailers attract sales from other retailers who don't accept credit cards is treated as a minor issue, in view of the widespread acceptance of credit cards. Unless industry-wide sales are increased, gains and losses from credit card sales will net out among retailers, yielding no net additional revenue to offset the higher costs of credit cards.

retailers, the costs of check transactions appeared to be smaller than for credit cards, and either about the same or larger than for cash. Large retailers were more likely than small retailers to rate both checks and credit cards as more costly than cash.

In Chapter 5, the issue of whether the higher costs of credit cards are included in retail prices was discussed. From a microeconomic perspective, it was concluded that prices in the long run would reflect all such costs that were not recovered directly from credit card users, but that the size of the price effect would be small. In total, the need to cover credit-related costs would likely boost the price of a given item by less than 1 percent. This minimal impact owes in part to the relatively small share of sales transacted by credit cards -- around 15 percent through third-party cards in the areas of general merchandising under study. If an added cost of 3 percent occurs on 15 percent of sales, the spreading of that cost over all sales would boost prices by just under 1/2 percent (.03 x .15 = .0045).

From a macroeconomic perspective, credit cards could potentially affect economic activity by altering the aggregate propensity to consume and/or the transactions demand for money. Some impact on the equilibrium level of prices during a period of adjustment to the introduction of credit cards was held possible, but available evidence suggested that such an effect would be small and mostly irrelevant to the long-run processes of economic growth or inflation.

From Chapters 3 through 5, it could be concluded that credit card transactions cost most retailers more than cash (or check) transactions, and that this cost is not offset by higher retail sales volume, but is reflected in the level of prices. As a result it could be said that cash buyers, at least to some extent, subsidize credit card users by paying identical prices.

Chapter 6 raised two possible methods of minimizing the subsidy: (1) removal of government-imposed artificial barriers to coverage of credit card costs via finance charges and other user fees, and (2) establishment of a two-tier price structure involving discounts for cash or surcharges for credit. Because of legislative changes, both methods have become more accessible in the past few years.

Revisions in state usury laws and other statutes have enabled card issuers to shift more of the cost of credit cards onto users recently. The Cash Discount Acts have encouraged two-tier pricing, but adoption of such pricing appears feasible for most retailers only if they simultaneously raise the base price from which discounts would be calculated, so that the "new" credit price is above -- and the discounted cash price only somewhat below -- the "old" single price.2/ This conclusion is based on results from surveys of consumer reaction to actual two-tier pricing of gasoline and to hypothetical discounts for cash on durable goods and clothing, as well as implications from the findings on costs in Chapter 4.

A polling of retailers on their current practices and attitudes toward discounts for cash, reported in Chapter 6, found that in the spring of 1983 cash discounts were typically the exception rather than the rule for types of business likely to accept credit cards in addition to other means of payment. About 25 percent of gasoline stations and 6 percent of other retailers offered discounts, with around 40 percent of all retailers surveyed describing discounts for cash as "a good idea." About three out of every ten retailers thought that surcharges for credit constituted a better approach to two-tier pricing than discounts for cash; 70 percent thought surcharges an inferior approach.

2/ Two-tier pricing through surcharges for credit would ordinarily result in the same structure of credit and cash price as under a discount-for-cash approach.

APPENDIX C

HYPOTHETICAL EXAMPLE OF TWO-TIER PRICING OF GASOLINE

This Appendix presents a hypothetical example of gasoline pricing before and after adoption of a discount-for-cash program; the principles involved would apply as well to other retailing situations. The example assumes that there are no shifts in underlying wholesale gasoline prices, that sales volume remains constant, and that the gasoline retailer has an objective of maintaining a constant level of profits.1/ The purpose of the example is to indicate the relationship that could be expected between a former single price for gasoline and a new two-tier set of prices, using estimates about certain aspects of buyer behavior that were discussed in Chapter 6, section 2, of the Board's Report to Congress.

The example, shown in table C.1, is constructed with 100 customers each buying one gallon of gasoline. Drawing on the results of a household survey of gasoline purchase experience, the assumption is made that about 40 customers would use credit cards and 60 would pay in cash in the absence of a discount offer. For sake of illustration, it is assumed that gross receipts of $120 would cover all costs, including credit card costs, and yield the gasoline seller some desired level of profits. Obviously, under a single-price system, the retail price of a gallon of gas would be $1.20 to each customer.

Introduction of a discount-for-cash policy complicates the price structure. In line with the discussion in Chapter 6 of the Report and

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1/ It is recognized that the introduction of a discount-for-cash program may affect a station's volume of sales, at least at first. The station may hope to increase sales by attracting cash users away from competitors. But competitive response by other stations is likely to minimize any sales advantage initially accruing to a dealer that sets up a two-tier system. Unless two-tier pricing were to stimulate total industry-wide gasoline sales, it would be inappropriate to assume some permanent sales gain for any particular retailer.

statistics presented there (in table 6.2), when a discount is offered, the proportions of cash and credit buyers are assumed to shift from .60 and .40, respectively, to .75 and .25. In the present example, then, 75 persons would buy for cash and 25 would use a credit card under two-tier pricing, for a net shift of 15 customers from credit to cash. Since this shift would reduce the seller's cost of carrying receivables, the gross revenue needed to maintain level profits would drop by 15 times the per gallon cost saving. In the example, a credit-handling cost of 3 cents per gallon of gas sold on credit is used, which approximates the cost estimated by several major gasoline companies. By influencing 15 customers to switch from credit card to cash, the gas station in the example could save 45 cents in credit servicing costs, thus reducing the level of gross revenues needed to maintain constant profits to $119.55 from $120.

Assuming that the cash price and credit price could be set to differ by the amount of credit-related costs per gallon, it can be calculated (as shown in table C.1) that the gasoline seller would need to price gas at $1.188 for cash sales and $1.218 for credit sales.[2/] Because the lower price for cash must be offered to those who would pay cash anyway, the cash price cannot be reduced from the old $1.20 price by the full amount of the per gallon cost of credit. Instead, the two-tier price points would bracket the old single price point.

2/ Alternatively, rather than assuming a price differential equal to the difference in cost between credit card and cash transactions, then solving for the two prices, one could assume the credit price to be set equal to the price that would be charged in a one-tier system ($1.20 in this example), then solve the equations for the cash price. Under this approach, it can be calculated that, given the credit price of $1.20 in the two-tier system, the cash price would have to be at least $1.194 to maintain the target level of profits.

Retail gasoline prices in the real world often fluctuate a few cents from week to week. Thus it is difficult to judge how closely an actual station's two-tier price structure vis-a-vis an alternative single price policy might compare with the example sketched here. However, as noted, values of the key variables in the example were chosen -- based on survey results -- to realistically reflect conditions faced by typical gasoline retailers. Moreover, as further calculations under alternative assumptions would show, the implications of the example do not depend narrowly on the specific values of the variables used. That is, under widely different customer purchasing habits, the new two-tier price schedule would still bracket the old one-tier price. For instance, if it were assumed that as many as 60 percent (instead of 40 percent) of the customers would use credit cards in a single-price system, and that only 20 percent would use credit cards in a two-tier system,3/ the "equal-profit" prices would be $1.182 for cash and $1.212 for credit, compared with the one-tier price of $1.20

3/ In other words, 40 percent of the total customer base would switch from credit card to cash in this alternative, compared with 15 percent who switched in the original example.

TABLE C.1

HYPOTHETICAL GASOLINE PRICING WITH CONSTANT PROFITS
UNDER ONE-TIER AND TWO-TIER PRICING SCHEMES

Single-price case:		Two-tier pricing:
$aX + bY = R$	revenue function	$(a+s)X + (b-s)Y = R - cs$
$X - Y = 0$	price structure	$X = Y - c$

calculations:

$$\begin{aligned} 60X + 40Y &= \$120 \\ X - Y &= 0 \\ \hline 100X &= \$120 \end{aligned}$$

$X = \$ 1.20$
$Y = \$ 1.20$

$$\begin{aligned} (60+s)X + (40-s)Y &= \$120 - \$.03s \\ X - Y &= -c \end{aligned}$$

$$\begin{aligned} 75X + 25Y &= \$119.55 \\ X - Y &= -\$ .03 \\ \hline 100X &= \$118.80 \end{aligned}$$

$X = \$ 1.188$
$Y = \$ 1.218$

where: X = cash price
Y = credit price
a = number of customers per 100 that typically pays cash
b = number of customers per 100 that typically uses credit card
R = desired gross revenue for initial cash/credit sales mix
s = number of customers that shifts to cash from credit
c = cost of financing receivables per gallon of gas sold on credit

assumptions:

a = 60, b = 40
R = $120
s = 15
c = .03
each customer buys one gallon of gas

APPENDIX D

RECOMMENDED STATUTORY LANGUAGE

A. Removal of the surcharge prohibition.

1. To remove the prohibition against the imposition of surcharges, and to ensure that card issuers will not prevent sellers from charging different prices by imposing a surcharge or by giving a discount, section 167(a) of the Truth in Lending Act is amended to read as follows:

Recommended	Current
SECTION 167--Price Differences for Credit Cards. (a) With respect to credit cards which may be used for extensions of credit in sales transactions in which the seller is a person other than the card issuer, the card issuer may not, by contract or otherwise, prohibit any such seller from charging different prices to induce a cardholder to pay by cash, check, or similar means rather than use a credit card.	SECTION 167--Use of Cash Discounts. (a)(1) With respect to credit cards which may be used for extensions of credit in sales transactions in which the seller is a person other than the card issuer, the card issuer may not, by contract or otherwise, prohibit any such seller from offering a discount to a cardholder to induce the cardholder to pay by cash, check, or similar means rather than use a credit card. (2) No seller in any sales transaction may impose a surcharge on a cardholder who elects to use a credit card in lieu of payment by cash, check, or similar means.* */ This provision will cease to be effective February 27, 1984.

B. Revision of the finance charge exclusion.

1. In order to apply the exclusion from the finance charge to surcharges as well as to discounts, to limit both to an amount equal to 5 percent of the cash price, and to limit the exclusion to credit card transactions, section 167(b) of the Truth in Lending Act is amended to read as follows:

Recommended	Current
SECTION 167--Price Differences for Credit Cards. (b) With respect to any credit card sales transaction, any difference in price offered by the seller to induce payment by cash, checks, or other means not involving the use of a credit card shall not constitute a finance charge as determined under section 106, to the extent that the difference does not exceed 5 percent of the cash price of the property or service, is applicable to all prospective buyers, and is disclosed clearly and conspicuously.	SECTION 167--Use of Cash Discounts. (b) With respect to any sales transaction, any discount from the regular price offered by the seller or the purpose of inducing payment by cash, checks, or other means not involving the use of an open-end credit plan or a credit card shall not constitute a finance charge as determined under section 106 if such discount is offered to all prospective buyers and its availability is disclosed clearly and conspicuously.

C. Relation to state usury and disclosure laws.

1. In order to provide the same protection from liability under state usury and disclosure laws to sellers imposing surcharges that is provided to sellers offering discounts, section 171(c) of the Truth in Lending Act is amended to read as follows:

Recommended	Current
SECTION 171--Relation to State Laws. (c) Notwithstanding any other provisions of this title, any price difference offered under section 167(b) of this title shall not be considered a finance charge or other charge for credit under the usury laws of any State or under the laws of any State relating to disclosure of information in connection with credit transactions, or relating to the types, amounts or rates of charges, or to any element or elements of charges permissible under such laws in connection with the extension or use of credit.	SECTION 171--Relation to State Laws. (c) Notwithstanding any other provisions of this title, any discount offered under section 167(b) of this title shall not be considered a finance charge or other charge for credit under the usury laws of any State or under the laws of any State relating to disclosure of information in connection with credit transactions, or relating to the types, amounts or rates of charges, or to any element or elements of charges permissible under such laws in connection with the extension or use of credit.

Senator GORTON. Thank you. Obviously, the central issue which is being debated in this controversy is whether or not and the degree to which credit card transactions cost more than cash. The Board's study, as you pointed out, determines that 2 to 3 percent is the cost of credit card transactions.

Some of the witnesses we are going to have here today claim that the Board's study fails to cite convincing data to support this conclusion.

Can you describe in a little bit more detail how this finding was arrived at?

Mrs. TEETERS. We used a series of studies, three in fact, one done previously on a survey of retailers done by Survey Research Service.

We've come to the conclusion that they do support the fact that credit card transactions cost more than cash transactions. However, if you take the total cost of credit and spread it across all transactions, the cost of credit that is reflected in the prices of items is not the merchant discount; the increased cost that the merchants impose on all customers is not the full amount of the discount, but a smaller amount due to the amount of sales that they make using credit. Since the total number of sales for credit average somewhere between 15 and 30 percent, and you're spreading the merchant discount—let's say it's 5 percent—over 100 percent of the sales, the increase in cost is only a fraction of the merchant discount.

CREDIT CARDS INCREASE SALES BY 20 PERCENT

Other studies—there's one cited here the Grant study—have, for example, assumed that the use of credit cards increases sales by 20 percent and as a result there's no increase in cost. That may have been true in the past but we don't think that credit cards increase total volume of sales, at least not in today's world; 20 or 25 years ago when credit cards were first being introduced they may have led to some increase in sales for merchants that accepted a credit card, but now they are universally accepted and we don't think they actually increase the sales.

Senator GORTON. That does lead to a criticism one of the other witnesses is going to make to the effect that the study is without any information on which to justify that conclusion that they don't add to sales volume by the merchant. Perhaps you will comment on that. Is your rationale for that simply that for all practical purposes all merchants offer credit or at least merchants——

Mrs. TEETERS. We investigated whether merchants thought that they had increased their sales with the introduction of credit cards. They are now so universal that there is no real advantage to introducing a credit card because practically every merchant in the area also offers credit.

We also looked into the question as to whether the use of credit cards increases impulse buying—the spur-of-the-moment type of purchase that you wouldn't otherwise undertake—and this indicates that there's no increase from that source either, that people are likely to do impulse buying by cash as well as credit.

Senator GORTON. The theory is that the use of these credit cards would increase sales in one of two ways; either their presence could increase sales by those merchants who offer credit and offer credit card use at the expense of merchants who do not. I think your answer has been that there's so few of the latter that it's hard to see any correlation.

The other alternative, of course, is that credit cards could increase overall the level of retail sales presumably at the expense of something else in the economy, whether it be savings, or major purchases of automobiles, homes, and the like.

Does your study and/or your opinion on the subject encompass both of those possibilities?

Mrs. TEETERS. Yes; our study covers both of those points. We did not find that it led to any overall increase in sales because of the widespread use of credit cards. We also found that it did not increase the sort of the spur of the moment, unplanned purchases by any large degree. You're as likely to do that with cash as you are with credit.

I think the impression that it helps impulse buying comes not from the overall application of this but the effects of the person who has their first credit card and has not yet paid their first monthly bill.

Senator GORTON. Do you also distinguish in the effect on prices between credit cards and other forms of credit? Obviously, all forms of credit, even if it is an informal one between a merchant who knows the purchaser has some cost because some of that credit turns out to be bad. Is there a distinction between the cost of credit cards and other commonly utilized methods of credit?

Mrs. TEETERS. We did not investigate that point, to the best of my knowledge. We were asked to study the cost of credit cards and the study is limited to that.

Senator GORTON. Your Board's study concluded that the extra cost of credit card transactions translates into a rise of retail prices by something less than 1 percent. Can you translate that into dollars?

Mrs. TEETERS. It's very difficult to do. What I did was to take personal expenditures in GNP accounts and subtract I think food and automobiles, and you come up with a number that's about $600 billion, and 1 percent would be about $6 billion. But that is an extraordinarily rough calculation.

Senator GORTON. Your study goes on to conclude that 25 percent of gas stations and only about 6 percent of other retailers offer cash discounts. I've got a double question in this respect, part of which stems from personal experience.

I'm not conscious of shopping at a retail store at which I found a cash discount. I don't remember that at all. At least at home in the State of Washington cash discounts at gas stations are very common, at least at that 25-percent level. Almost without exception those cash discounts, however, are 4 cents a gallon which is far in excess of the 1-percent cost of credit cards to which you testified.

So my two-part question is, can you explain why that would be—or a three-part question—why it is that that's so much more fre-

quently used at gas stations than other retailers and just in general why cash discounts are not more common?

WHY ARE CASH DISCOUNTS NOT MORE COMMON?

Mrs. TEETERS. I really don't know. It has become a tradition in the gasoline industry within the past 1½ years. It's not all gasoline retailers. It's limited to a few companies and in some cases I think you probably have also seen the ads, "We take anybody's credit card." At least one of the retailers is going the opposite direction on this.

The best thing that I can think of is that they don't want to administer a two-tier system. I agree with you. I've seen very few retail outlets, other than gasoline, that have cash discounts, and those that did—there was one here in town that did and later eliminated it and instituted credit cards. Why that happens, why people are not more interested in lower prices, I simply don't know.

Senator GORTON. Do you have the slightest degree of confidence in the proposition that if we were to end the prohibition on surcharges that the use of surcharges would be any broader than the use of discounts at the present time?

Mrs. TEETERS. I don't think we have any information directly on that. There's a good deal of goodwill involved here between the merchant and the customer and I suspect that they would be very reluctant to antagonize the customer by imposing a surcharge after a sale has been essentially concluded.

Senator GORTON. So your backing of ending of surcharges is theoretical rather than from any practical confidence of what would happen?

Mrs. TEETERS. We have had the possibility of discounts now for a very long period of time and even the gasoline stations didn't do it until within the past year or 18 months. So there's not a great movement out there that says we want a discount for cash. At least that's not my perception of it.

Senator GORTON. Getting back to my example of the almost universal—at least in the State of Washington—4 cent discount for cash purchases of gasoline, if we also allowed the gasoline retailers to add a surcharge, wouldn't it be highly likely that they would abolish the cash discount and go to the surcharge and with the surcharge or the difference between the two prices might be less than that 4 cents a gallon?

Mrs. TEETERS. I'm not sure that it would because then, since they're essentially the same thing, you get essentially a two-price system, one for cash and one for credit cards. You don't have a normal or an average price on which to measure the discount or the surcharge against, and I'm not sure if you allow both the surcharge or the discount what that normal price would represent. I think that normal competition will establish the size of the surcharge. If the surcharge gets too large, then all your business will go someplace else, and it will be attracted to the discount.

I think our experience with the gasoline operation only points up that the essence of the thing is that a surcharge and discount do come out to be the same thing, and if the 4 cents is the economic

cost of a credit transaction to a service station, I doubt if that would change.

Senator GORTON. Senator Proxmire.

Senator PROXMIRE. Obviously, in the chairman's State, the State of Washington, the people who sell gasoline have no problems providing for a cash discount and apparently, according to the chairman who's an expert in that, the overwhelming majority do provide for a cash discount.

On the other hand, there's some merchants according to your statement at the bottom of page 5 where you state the following:

> Another possible explanation is that the similarity between discounts and surcharges causes merchants to be confused about what is a permissible discount and what is an illegal surcharge—as evidenced by many inquiries the Board has received about the distinction. This uncertainty may discourage merchants from risking a violation of federal law. If the lack of two-tier pricing is related to either or both of these factors, then there is some hope that permitting both pricing schemes might promote the result Congress originally hoped to achieve.

So what you're saying is that there are at least some merchants—apparently not the filling station operators in Washington but elsewhere—who don't offer a cash discount now because they are nervous. They're afraid since we don't permit a surcharge that this may be viewed as a kind of a covert or hidden surcharge and therefore not legal and therefore not proceed with it. Is that right?

Mrs. TEETERS. That's our perception of the problem.

Senator PROXMIRE. Now your report didn't find any connection between the availability of credit cards and consumers' buying habits and savings. Did you find any relationship between the increase in the use of credit cards and the dramatic increase in bankruptcies in recent years?

Mrs. TEETERS. Not that I'm aware of.

INCREASE IN THE USE OR CREDIT CARDS AND BANKRUPTCIES

Senator PROXMIRE. There has been an increase in both the use of credit cards and bankruptcies. There's been a lot of feeling on the part of some people that there's a tendency for some of us if we have credit cards to get in over our heads.

Mrs. TEETERS. I think that's true on any credit that you have. I think it's very difficult to disentangle the increase in bankruptcies from the change in law that occurred 2 or 3 years ago. I'm not aware that there is a direct link between the use of credit cards and the increase in bankruptcies.

Senator PROXMIRE. Did the Fed do any work or has anybody else done any work to determine whether there's a psychological difference between the imposition of credit surcharge and the offering of a discount for cash?

Mrs. TEETERS. No; we didn't study that.

Senator PROXMIRE. You don't know about that. I'm bothered somewhat. I made a statement in the beginning in my opening statement that I was concerned about this interference with the merchants and I thought we shouldn't interfere unless there's a very, very clear case in the public interest for doing so.

So why do you put any limit on the amount of surcharge or discount a merchant can charge? Why can't the market take care of it?

Mrs. TEETERS. Because it becomes involved in the essence of truth-in-lending. If you have unlimited surcharge and then it is not included in the amount of the finance charge and figured in the annual percentage rate, it could simply violate or interfere with the truth-in-lending credit cost disclosures. Suppose you have a huge surcharge, 5, 10, 15 percent, and then you also charge the usual 18 percent interest. In calculating the APR, if you include the surcharge, then the APR could turn out to be 30 or 40 percent if it were included, but the legal 18 percent if it weren't included. So that it seemed to us that in order to preserve the basic concept of truth-in-lending, the average annual percentage rate in shopping for credit, and the integrity basically of the truth-in-lending law that it would be necessary to limit this to no more than 5 percent.

Senator PROXMIRE. Would it be practical to say you could charge anything you wanted to but if you charged over 5 percent you would have to disclose the true annual rate?

Mrs. TEETERS. That's exactly what we're proposing. Any amount over 5 percent would be included in the finance charge and therefore in the calculation of the APR.

Senator PROXMIRE. So you wouldn't prohibit them from charging whatever they want to charge. You just would have to tell the credit card user what the true annual rate was.

Mrs. TEETERS. We are proposing that the 5 percent be excluded from the calculation of the annual percentage rate. If he wants to charge more than 5 percent, it would have to be part of the finance charge.

Senator PROXMIRE. So you wouldn't interfere with his right to charge what he wants?

Mrs. TEETERS. We wouldn't, but remember there are State usury laws that would then limit how much he could actually charge on the transaction.

Senator PROXMIRE. That's obviously beyond our control. As far as Federal law is concerned, as far as recommendations of the Federal Reserve Board are concerned, you would simply require disclosure?

Mrs. TEETERS. That's right.

SURCHARGES BE EXEMPT FROM USURY LAWS

Senator PROXMIRE. You're recommending that surcharges be exempt from usury laws. Do you see any disruption to our credit system if these charges go into effect upon the expiration of the surcharge ban later this month?

Mrs. TEETERS. I can't think of any.

Senator PROXMIRE. You don't need more study? You see, when I made my opening statement, too, I pointed out that we have extended, extended, and extended this thing four times in 8 years and they always say, well, give us a little more study. They don't say they're against it because I don't see how they can on principle. They say we need more study. You don't think they need more study?

Mrs. TEETERS. You've asked some questions that we haven't investigated, but I don't see that those are particularly burning questions that need answering before you make up your mind on what you're going to do with it.

Senator PROXMIRE. Thank you.

Thank you, Mr. Chairman.

Senator GORTON. Your Fed study concluded that only a relatively small share of sales are transacted by credit cards, 15 percent through third-party cards, 30 percent for in-house store cards. I've been made aware of a recent article in the USA Today which I'll have included in the record which surveyed four stores and found that 56 percent of sales at Sears were credit sales, the figure at Penney's was 43 percent, Federated 37 percent; the Carter Holly Hill stores 60 percent of the total sales.

[The news article is printed on pp. 33 and 34.]

Senator GORTON. Do these just happen to represent the high end or should we suspect that credit sales are considerably higher?

Mrs. TEETERS. We think they are the high end. Those are the stores that we think—Sears, for example, has the most cards out of anyone, but we think that those represent the high end of the credit use. There are hundreds of thousands of stores that offer credit which don't have very high volume of sales.

Senator GORTON. One of today's later witnesses will oppose surcharges because they might subject cardholders to discrimination. For example, the merchant might impose one surcharge amount on one cardholder and a higher surcharge on another cardholder.

Under the recommendation of the Federal Reserve Board, would merchants be allowed to impose different surcharges on two different Mastercard holders or would a merchant be allowed to impose a different surcharge on Mastercard holders from the surcharge on the holders of their own credit cards?

Mrs. TEETERS. We did not address that specific question in either the study or in the proposed legislation. I would think that if there's a difference in cost between different types of cards that the merchant probably should have the flexibility to impose different costs. I think what's very important here is that the merchant disclose what his policy is. You notice in the gasoline stations there are very large signs on the pumps that say 4 cents off with cash or 5 cents off with cash, whatever it is. It would seem to me if merchants are going to be permitted to charge different costs for different types of cards, then that should be posted in a prominent place where the transaction takes place.

Senator GORTON. Or different charges for holders of the same card?

Mrs. TEETERS. I would think that the holder of the same card—if it's the same card, I don't see any reason to have a different discount. But if it's a different card and there are different costs of using the cards, I don't see why he shouldn't be able to adjust his surcharge and discount for that fact.

Senator GORTON. I may have asked this question before or you may have answered it in connection with an earlier question, but I now am directing it either at the Board collectively or you as an individual.

WOULD SURCHARGES LOWER BASE PRICES?

Do you believe that if we were to permit surcharges that some, many, most of all retailers would lower their base price?

[From U.S.A. Today]

Business of Creating Business—Despite High Cost Involved, Retailers Say Credit Cards Are an Asset

(By Lorraine Cichowski)

Holiday cheer gives way to post-holiday blues for many of us as the charge-account bills fom our Christmas shopping sprees start coming due.

But for many of the merchants who let us "buy now and pay later," the blues come from multimillion-dollar annual losses from their credit-card operations—despite double-digit interest fees routinely added to accounts older than 30 days. But retailers' high cost of running those programs are exceeded by customer demand for more and more store credit cards.

"Consumers need credit," said Marie Drum, controller of Carter Hawley Hale Stores Inc. "Therefore, if we want to serve our customers, we must offer credit."

Industry figures show that store credit cards accounted for 52.25 percent of all department store sales in 1982, up 6 percent from 1981. The percentage is expected to reach nearly 55 percent when 1983 statistics are compiled.

When third-party cards like VISA and MasterCard are added, credit transactions as a percentage of total sales climb to more than 62 percent.

Most retailers encourage use of credit cards, believing that card-carrying customers spend more than cash-carrying customers. In fact, accounts receivable—the amount customers owe stores—are the largest asset of most retailers.

"Credit is the business of creating business," said Alan Hooker, divisional vice president for credit operations at Philadeliphia-based John Wanamaker.

But a credit card that bears a department or specialty store's own name is expensive for the individual retailer.

Finance-charge income rarely covers the company's cost of borrowing money to pay for inventories and new construction while waiting for customers to pay off their bills.

The costs of administering the credit division, including mailing out monthly statements and paying a staff to handle customer problems, means that profit from merchandise sales often subsidizes credit operations.

J.C. Penney Co. Inc. collected $528 million from finance charges in 1982. Expenses for administration, interest on unpaid balances and bad debt exceeded $580 million.

The National Retail Merchants Association estimates that typical department store losses each year on credit-card operations amount to 3.1 percent of total credit sales. A recent survey of 700 retailers by the Federal Reserve Board found that 88 percent believed credit cards are more costly to them than accepting cash payment for goods.

For retailers, the solution to paring those losses has been aggressive cost-cutting in their credit departments—including consolidation of some operations; eliminating deferred holiday billing; shortening or lengthening customers payback periods; and increasing interest rates to state-imposed limits. Ohio allows finance charges as high as 25 percent; 16 states have no ceilings.

Carter Hawley Hale Stores Inc., owner of Neiman-Marcus and the Broadway, stopped allowing customers to delay payments on holiday purchases until the new year. Carter Hawley Hale, which lost nearly $27 million on credit operations in 1982, still had record Christmas sales in 1983.

Zale Corp., the large jeweler, has closed one-third of its regional credit offices since 1981, improved its credit-checking policies and lengthened its payback period to 24 months. Randy Lively, president of Zale's credit subsidiary, anticipates that Zale's cost of credit will drop 60 percent in the year ending March 31, 1984—from 5.5 percent of all credit sales to 3.3 percent.

Falling interest rates are reducing the amount that retailers pay when they borrow, lowering their credit costs from the peak years of 1980 and 1981.

Sears, Roebuck and Co. credited lower interest rates as well as tight expense controls with turning a loss of more than $80 million on 1981 credit-card operations into a 1982 profit of $17.8 million.

Sears figures that, of all the corporate borrowing it did in 1982—mostly in the form of selling notes and bonds at interest rates ranging from 6 percent to more than 14 percent—$586.5 million went to pay for credit operations.

To boost income in the credit division, Boston-based Almy Stores Inc. includes outside advertising from such sources as Good Housekeeping magazine in its monthly statements and in November began selling its list of credit customers to direct-mail companies.

Philip Dine, credit vice president, expects income from selling lists to total $75,000 this year and says Almy makes "several thousand dollars a year" by allowing advertising in its statements.

The one option retailers are not considering is dropping credit cards, which have become respected as one of the retail industry's most important marketing tools and which represent one of retailers' largest assets. Accounts receivable totaled $7.9 billion at the end of 1982 at Sears, which claims nearly 25 million charge accounts. Customers owe Detroit's J.L. Hudson Co., with 1.5 million charge accounts, $170 million.

In fact, most retailers are signing up new accounts as fast as possible, many of them offering salespeople incentives like cash bonuses each time they take charge-account applications.

Almy Stores gave clerks a Susan B. Anthony dollar for each new account signed up during a recent promotion. Waldoff's specialty clothing store in Hattiesburg, Miss., has increased the number of its charge-account holders by 317 percent since 1979.

Retailers cite these benefits from credit cards:

They boost sales. James Tornoe, vice chairman of J.L. Hudson, said a new student-account program added $500,000 in sales during its just-completed first year. Hudson deferred-payment accounts, including its Christmas holiday money, generated an additional $4 million in 1983 sales.

The highest sales volume at the exclusive Brooks Brothers specialty clothing stores occurs during the first courtesy day for charge customers preceding Brooks Brothers' semiannual sale.

They allow advertisers to target charge customers and include ads in monthly statements. "Years ago, management viewed credit operations as loss centers," said Gerald Simons, director of credit at Brooks Brothers. "We're not profit centers, but credit operations are important to the bottom line. One of the contributions we make is ability to communicate with the customers once an account is opened."

They promote customer loyalty. Wanamaker's Hooker claims customers pay more attention to advertising by stores where the customer is a cardholder.

Despite the losses, the store credit card is here to stay.

"Credit is not just customer service," said Lonny Jay, chairman of Famous-Barr specialty stores of St. Louis, Mo. "It is a critical marketing tool that generates sales."

Mrs. TEETERS. They might over a long enough period of time. I think it takes time for people to understand things like this. It takes time for practices to spread. It takes time for competition to work. If you have a discount system for cash it would take time for it to spread. Some people like credit cards. Credit cards provide a certain amount of convenience for the consumer and, again, in the gasoline area, I've cited this once before, you will find stations at least in this city within two or three blocks of each other one of which is offering a discount for cash and the other with an almost equally large sign saying that we take anybody's credit card.

I don't know that we can predict individual behavior of either the merchant or the customer over a long period of time.

Senator GORTON. Do you have more confidence in the proposition that a retailer who availed himself of the ability to impose a surcharge on credit cardholders would in fact lower the cash price at the same time and to the same degree?

Mrs. TEETERS. I don't know. I would assume that competition would force them into it in the long run.

Senator GORTON. Then you run into the clear possibility at least that by adopting this change we would drive up the price to credit cardholders without a corresponding benefit to cash purchases.

Mrs. TEETERS. You see, the problem here is that you don't have a legal definition of the regular price.

Senator GORTON. I didn't use that term in the question.

Mrs. TEETERS. I know, but to really know whether prices are going up or down as a result of a surcharge or a discount, you have to have some starting point and that's what's missing in all of these discussions.

Let's take gasoline sales and assume you've got a 4-cent differential. Is the normal price half of that or is it the credit price? Unless you have a definition of what it would have sold for without the surcharge or discount, you don't know whether prices are going up or down.

Senator GORTON. Your study in finding that 25 percent of gasoline retailers offer a cash discount now did not attempt to compare on any scientific basis a posted price in those gas stations as against those for which there was no discount to see whether or not one was lower than the other?

Mrs. TEETERS. I gather that's true.

Senator GORTON. That should be a relatively easy question to answer, shouldn't it?

Mrs. TEETERS. I think it requires sending people out to take a look at it. I don't know. Have we investigated this?

Mr. LUCKETT. No, we did not. The survey of gasoline stations was a nationwide sample. It wasn't concentrated on the gasoline stations in particular areas.

Mrs. TEETERS. So we don't know how the posted price in a station that offers a cash discount compares to one that does not?

Mr. LUCKETT. That's correct.

Mrs. TEETERS. We do not.

Mr. HURST. Based upon the economics of the situation, however, and there's an appendix C to the study that discusses what we would view as being a typical pricing situation in the gasoline industry, a service station operator desiring to offer a discount would be, by the economics of the situation, required to adjust his price up somewhat to establish a credit card regular price from which he would reduce the price to arrive at the cash price that would take account of a cash discount. So appendix C does address that issue and also in one of the chapters in the report there is a discussion of the probable pricing practices of a merchant that engages in cash discounts.

Senator GORTON. So you would expect a Mobil dealer, as an example, in a given market who offered a cash discount to have a somewhat higher pump price than a Mobil dealer who did not offer a cash discount?

Mr. HURST. Based upon appendix C, it would indicate—and the chapter in the study—if in fact the person is operating given the assumptions that are set forth—and it's going to depend upon whether or not the merchant, for example, encounters a very large increase in his sales volume or a very large increase from credit to cash based upon the cash discount program—and once again, the appendix goes through the figures better than I can orally—however, absent some significant shifts, a merchant would be essentially in a position of having to do just that, and I think the oil industry representatives could probably address that better, but I think that there is some indication that prices were adjusted.

That does not mean that cash customers had no benefit. However, they probably had a benefit of something less than 4 cents per

gallon to the same extent the credit card customer was probably not paying precisely what he was paying before the cash-discount program went into effect. That's part of the basis for the Board's continuing position that surcharges and discounts are very much the same, as stated in the testimony. They result in levels of prices that are essentially the same.

Senator GORTON. Would you identify yourself for the record?

Mr. HURST. My name is Gerald Hurst. I'm an attorney in the Division of Consumer and Community Affairs at the Board.

AMEND THE TRUTH-IN-LENDING ACT

Senator GORTON. Two of the witnesses from the oil industry today propose that we amend the Truth-in-Lending Act to allow the imposition of both annual participation fees, and transaction fees, and preempt State usury consumer credit laws. The purpose of the amendment is to allow the card issuer directly to assess the cardholder for credit costs. Are you familiar with the proposal?

Mrs. TEETERS. I am familiar with the proposal.

Senator GORTON. Can you comment on it?

Mrs. TEETERS. Well, it seems to me that that is a very open attack on truth-in-lending and the annual percentage rate. This is a way of adding credit costs without them being included in the finance charge and possibly is a violation of State usury laws. Remember, in truth-in-lending what has to be included in the finance charges is very specific and this proposal would be a way of increasing the interest cost or the cost of credit without reporting it in the finance charge and annual percentage rate.

Just reading over this—and I'm not terribly familiar with it—but it seems to me that it could be conceivably very expensive to the consumer.

Senator GORTON. So you oppose it?

Mrs. TEETERS. I personally oppose it. It's not something that's been before the Board.

Senator PROXMIRE. Mr. Chairman, I just have one question. I think you asked a very proper question and I think it goes to the heart of this thing when you asked, "Isn't it possible that if you provide for a surcharge the credit card customer will pay more and the cash customer won't get any benefit." I think that's what haunts a lot of people and that's why some people think we ought to keep it the way it is.

I think the answer there—I think Governor Teeters gave the right answer but we didn't emphasize it enough—and that is, it depends on the competitiveness of the marketplace; and, since the retail business is highly competitive, there's every reason to expect that over time that you would get a benefit for the cash customer and would get some increase, of course, in cost for the credit card customer and the credit card customer would pay his share of the cost of credit over time.

Mrs. TEETERS. Over time.

Senator PROXMIRE. And there's every reason to expect that they do have a competitive situation.

Mrs. TEETERS. Yes; I would say where we have seen it is in the gasoline industry which is highly competitive. As I interpret the

appendix C which works through an example, more or less what we would expect to happen is that the credit price would rise by the cost of total credit offered by that retailer, which might be in the neighborhood of 1 to 2 percent. The cash price would then be lower than the credit price by an amount that would probably be in the range of what the merchant discount is.

Senator PROXMIRE. Thank you, Mr. Chairman.

Senator GORTON. Thank you.

The first panel will include Sandra McLaughlin, senior vice president, Mellon Bank; and David 1. Greenberg, legislative director, Consumer Federation of America.

Mrs. McLaughlin, you may proceed, and as in the case of Mrs. Teeters, your entire written statement will be included in the record.

STATEMENT OF SANDRA McLAUGHLIN, SENIOR VICE PRESIDENT, MELLON BANK, CHAIRMAN, BANK CARD DIVISION, AMERICAN BANKERS ASSOCIATION

Mrs. MCLAUGHLIN. Thank you, Mr. Chairman and members of the subcommittee. My name is Sandra J. McLaughlin, senior vice president, Mellon Bank in Pittsburgh, Pa. I am representing the American Bankers Association in my capacity as chairman of the association's bank card division.

As you may know, the association membership consists of over 90 percent of the approximately 14,500 full-service banks in this country. The combined assets of our nearly 13,000 member banks represents approximately 95 percent of the industry total. Our members represent every different size of bank quite literally from the largest to the smallest. However, approximately 90 percent of our members can be described as community banks having assets of $100 million or less.

FAVOR PERMANENT BAN ON SURCHARGES

Let me begin my comments by saying that we are not arguing in favor of an extension so that there can be further study. We are, in fact, in favor of a permanent ban on surcharges on retail transactions at the point of sale.

Our written statement sets forth in some detail why we believe authorization of surcharges would be unwise and unfair. That statement also refutes the arguments of those who would authorize the surcharge. But, of course, I cannot hope to cover everything in that statement in the short time I have here today. So let me just highlight a few points of that statement.

The first point I would make is that authorization of the credit surcharge would make the consumers' job of determining the true cost of retail goods and services and the true cost of credit much more difficult. If surcharges are authorized, the consumer will have yet one more factor to complicate his shopping decisions.

Moreover, consumers would not be able to rely on advertised, posted, or tagged price as the highest price for a product or service. Some retailers would offer cash discounts, some would impose surcharges on credit, and some retailers would probably do neither.

When a consumer sees a television, for example, advertised or tagged with a price of $499, the consumer would still not know the actual cost to him or her of that television. The consumer will go to the store and present a card for payment only to find that the actual price to the consumer is $525 precisely because of a 5-percent surcharge.

Note that retailers offering a cash discount have a strong incentive to disclose that discount in advertising, whereas the retailer who imposes a surcharge might have precisely the opposite incentive.

Allowing surcharges will also reduce the value of a credit card to the interstate traveler. Presently, a traveler can certainly rely on a credit card as being very nearly as acceptable as cash. While traveling a consumer might deal with many businesses which are not relying on repeat trade. That in fact would be a high probability. If surcharges are allowed, the traveler will have to carry extra amounts of cash to avoid being gouged by those businesses that are not concerned with whether or not the consumer returns to patronize the business again.

These examples point out just a few of the problems the banking industry would experience in maintaining an attractive, useful product for their customers if, in fact, surcharges are permitted. Each time the customer had a negative experience with his or her card because of a surcharge, its attractiveness and utility is surely diminished.

Second, we don't believe that prohibiting merchants from imposing a surcharge is in any way unfair to the merchant. Some would argue that the bank is imposing a fee on a merchant; therefore, the merchant should be able to pass that on to the consumer.

But let's take a closer look at the merchant's choices as they relate to the acceptance of a card. The retailer who accepts the card typically—and I say this from long years in the business—typically does this for one reason, and one reason only: The retailer believes that more consumers will find it convenient and desirable to patronize his or her business.

Card issuers have worked very hard to make that perception a reality. If the perception were not a reality I suspect the retailers simply would refuse any longer to accept credit cards. Indeed, there would be no reason to accept cards.

In effect, the retailer is gaining a real economic benefit from the goodwill associated with the credit card. It is not unreasonable to expect the retailer to pay a nominal fee for that benefit as he does for many other services.

Surcharges allow the retailer to avoid paying for the economic benefit that the retailer is receiving. At the same time, the retailer surcharge surely damages the goodwill associated with the card in the eyes of the resentful consumer who has been required to pay the surcharge.

The retailers options certainly are not unduly restricted by a prohibition on surcharges. If he or she does not believe the additional business generated by accepting a card is sufficient to justify paying the small merchant fee, then clearly the retailer is free to drop the card and rely on other forms of payment, like cash or checks or in-house credit, even a competing third-party card. The

retailer is also able to offer discounts for cash, discounts that don't have the negative effect on the card issuers goodwill that would be generated by a surcharge.

IMPACT IF PROHIBITION ON SURCHARGES IS ALLOWED TO EXPIRE

Our written statement points out the potentially dangerous problems for card issuers that will result if prohibition on surcharges is allowed to expire. I would urge you not to take lightly the potential exposure of the bank card industry to violations of State usury laws and truth-in-lending laws. Such exposure could have very serious effects on banks or other card issuers. It would require, for example, major systems changes to permit us to disclose adequately as a part of the APR surcharges that can vary from merchant to merchant. It might very well place us at the individual State levels in a position of violating State usury laws or adjusting on an individual basis the finance charge charged to individual customers.

In the case of Mellon Bank, for example, which is neither the largest or the smallest issuer in the country, that would mean adjustment for some 300,000 individual customers on a monthly basis where indeed the APR and finance charge could vary by customer and by month.

In addition, one class action under the Truth-in-Lending legislation would expose a bank to penalties of $500,000 or 1 percent of net worth, whichever is less. Many violations of State usury statutes call for forfeiture of not only interest but principal as well.

Again, in my own State, the State of Pennsylvania, the statute calls not just for interest but for twice the amount of interest charged.

These are very serious risks indeed. Clearly, we would prefer and we believe the evidence justifies resolving those problems by a permanent ban on surcharges. However, at a minimum, a temporary continuation of the prohibition is vital. We regard that as a time period for those who have doubts, which we do not, to examine the issue further.

I thank you, Mr. Chairman, and your committee very much for your attention. I'll be glad to answer questions.

[The complete statement follows:]

TESTIMONY OF THE
AMERICAN BANKERS ASSOCIATION
BEFORE THE
SUBCOMMITTEE ON CONSUMER AFFAIRS
SENATE COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS
ON
CREDIT CARD SURCHARGES

FEBRUARY 7, 1984

Mr. Chairman and members of the Subcommittee, my name is Sandra J. McLaughlin, Senior Vice President, Mellon Bank in Pittsburgh, Pennsylvania. I am representing the American Bankers Association in my capacity as Chairman of the Association's Bank Card Division.

The Association's membership consists of over 90% of the approximately 14,500 full-service banks in this country. The combined assets of our nearly 13,000 member banks represents approximately 95% of the industry total. Our members represent all different sizes of banks. However, approximately 90% of our members can be described as community banks having assets of $100 million or less.

Our Association welcomes this opportunity to present our views on the problems associated with an expiration of the prohibition on credit card surcharges. That prohibition is currently set to expire on February 27. The first part of this statement sets forth the reasons we feel that a continued prohibition on credit card surcharges is justified. In brief, we believe that consumer confusion and abuse are likely to result from the authorization of surcharges. We further believe, that the imposition of a surcharge by a retailer would unfairly appropriate a card issuer's "goodwill" and promote an unfavorable image of the card issuer's product. The second part of this statement responds to the traditional

justifications for allowing the surcharges put forth by our opponents on this issue. The final section of this statement seeks to describe the particular problems that will result from an expiration of the surcharge without additional action by Congress to correct those problems. We have also attached our analysis of the recent study by the Federal Reserve Board on the impacts of credit cards on retail costs, prices, and sales.

Rationale for Prohibiting Surcharges

The argument over whether a merchant should be prohibited from adding a surcharge to prices when the consumer pays by credit card has been the subject of much confusion and controversy. Since 1974 when Congress first authorized merchants to offer discounts to consumers who pay cash, surcharges have been prohibited by law. Recently, in 1981, Congress extended the prohibition on surcharges until February 27, 1984.

The card industry can point to many reasons why there are practical problems and administrative differences between a two-tier system of pricing based on cash discounts, and a two-tier pricing system based on credit surcharges. The major differences can be divided into three categories:

- Authorization of two two-tier pricing systems would lead to consumer confusion regarding the true price of goods.
- Credit card surcharges offer a potential for a limited number of merchants to engage in abusive pricing practices.
- The authorization of credit card surcharges would allow merchants or retailers to misappropriate the card issuer's "goodwill".

I. The Authorization Of Surcharges Would Negate The Purpose Of The Truth-In-Lending Act To Avoid Consumer Confusion Regarding The Cost Of Credit.

The practical difference between a credit card surcharge and a cash discount is that surcharges are added to a "regular" price and cash discounts are deductions from a "regular" price. Where one or the other type of two-tier pricing structure is in place, the consumer can readily compare costs and determine the benefits of using a credit card or paying with cash. However, if both types of two-tier pricing are allowed, the consumer will be faced with confusing decisions regarding the use of credit.

Consider the plight of a consumer seeking to replace a large household appliance (a refrigerator, dishwasher, etc.). Assume that the purchase is an immediate need and no cash is available and therefore, the consumer must use a credit card to make the purchase. The consumer seeking to purchase a specific appliance may see the item advertised at two different prices at two different retailers. The advertisements may or may not disclose the existence of cash discounts or credit surcharges. Assuming that no disclosure is made, the consumer may go to the store offering the lowest price only to find that using a credit card would require paying a significantly higher price than anticipated. If the consumer had gone to the retailer advertising the seemingly higher price (but without a credit surcharge), the consumer could have purchased the item at a lower price. The time, energy, and expense of then going to the second store may eat up any savings available at that store.

The confusion is not significantly reduced even if both retailers disclose their policies with respect to surcharges and discounts in their

advertisements (an unlikely situation). In that case, the consumer would have to carefully calculate to determine which price is best. Note that in advertising the merchant offering a cash discount has a strong incentive to disclose its availability. The merchant surcharging a credit card has an incentive not to disclose the surcharge.

The consumer who has flexibility with respect to whether or not a credit card would be used would have an even more difficult time. That consumer would be faced with the same problem regarding difficulty in knowing what the "regular" price represented, as the consumer in the example above. But in addition, that consumer would be confronted with four different prices together will all the normal considerations regarding the use of a credit card (i.e., free ride period, extra convenience, cost of finance charges, etc.).

One intended purpose of the Truth-in-Lending Act was to enhance the consumer's informed use of credit. However, without one "regular" price that consumers can rely on as either the price which is discounted for cash or the price which is surcharged for credit, consumer are faced with extreme difficulty in understanding the true cost of using a credit card as a payment mechanism or more accurately the true cost of the retail goods or services being purchased.

II. Credit Surcharges Represent Greater Potential For Abuse Than Do Cash Discounts.

A logical extension of the consumer confusion that would result from credit surcharges would be the potential consumer abuse. This abuse may be in a fairly mild form in which a consumer enters a store and selects an item with an attractive price tag. As the consumer presents the item to the cashier, the consumer is informed that the price is not the price noted

on the tag, but a price 10 percent higher, if a credit card is used for payment. Some people, at that point, would refuse to accept the item and would leave the store. Others, however, would not face the embarrassment of returning the item but would take it at the higher price.

This milder form of consumer abuse would be aggravated when the consumer needs the merchandise or service immediately, or must use a credit card for payment. A representative example would be when a consumer dines at a restaurant and, when presented with a bill, is informed that there is a surcharge for the use of a credit card. At that point, it would be awkward to return the meal and the consumer is faced with no alternative but to accept the higher price. If the consumer had known prior to entering the restaurant that credit cards entailed payment of a premium, the consumer may have made a different eating decision.

Similar problems could arise in hotels. Consider the consumer who has a reservation at a convention hotel, which informs the consumer, at time of check-in, that the hotel imposes a surcharge on the use of a credit card. At that point, the consumer has little alternative but to accept the surcharge.

Any retailer that does not rely on repeat trade such as a tourist shop, tourist attraction, or gasoline and repair service along an interstate highway would also present potential for abuse.

III. Surcharges Present A Greater Opportunity For Retailers To Misappropriate The "Goodwill" Of Credit Issuers.

Card services are unique when compared to other services provided by retailers. The charge for a parking lot, the charge for cash registers, the charge for shelves that merchandise is stacked on, the cost of storing inventory and other services provided by the retailers are not separately

advertised and promoted by groups independent of the retailers. Third party card services are separately advertised and promoted with a view to increasing their attractiveness to consumers. The retailer who signs for a credit card plan receives benefit from accepting that credit card. That benefit is the additional sales generated by the recognition and acceptance of that credit card. It is not unreasonable to expect the retailer to pay a small charge for this benefit.

The benefit accrues to the retailer because of the "goodwill" of the card issuer. VISA, MasterCard, American Express, and other card issuers have spent many dollars and invested in substantial efforts in advertising and in providing a convenient, effective payment mechanism - thereby, making their product attractive to consumers. By allowing retailers to impose surcharges on the price of goods or services they are selling, the retailer would be misappropriating this goodwill. The consumer would be paying the retailer for the demand generated by the card issuer through his efforts and expenditures. In effect, the retailer is appropriating goodwill for the card service and using it to charge an increased price for the products or services of the retailer.

The surcharge would also present an opportunity for the retailing industry to promote in-house credit cards at the expense of the widely accepted third-party cards. Retailers, in many situations, would surcharge the use of credit cards issued by a third party without surcharging their own in-house credit. In effect, they would be charging for the goodwill of the third-party issuer in order to subsidize their own credit operations.

We note that the retailers would not be limited in the amount of a surcharge. The retailer would be able to include additional charges in a purported surcharge for credit card use that goes beyond any conceivable

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cost associated with the card. We see little that could be done to control such excessive surcharges.

Arguments for Surcharges

In the 1981 debates on the issue of whether surcharges should be prohibited, proponents of authorizing surcharges made a number of assertions. These assertions can be categorized under three basic arguments:

- o a continued ban on surcharges represents an impediment to the operation of a free market system.
- o the authorization of credit card surcharges would reduce inflationary pressures caused by high interest rates.
- o as a result of the ban on surcharges, cash customers are forced to subsidize card users.

Upon analyzing each of these arguments in turn, we believe they are without merit.

I. Authorization Of Surcharges Does Not Represent A Free Market Issue.

The proponents of surcharges have tried to assert that regulation of surcharges is a free market issue rather than a fair competition issue. However, these proponents of surcharges failed to recognize or to disclose that the free market system can already work through the mechanism of cash discounts. Merchants who feel an economic incentive or need to differentiate between a credit price and cash price are free to do so subject only to limited disclosure requirements.

The recent Federal Reserve Board Study notes that the free market system is in fact working. Twenty-five percent of the gasoline retailers surveyed in the Board Study were offering a discount for cash. Six percent of the remaining retailers were also offering a discount. While this low percentage does point out that differentiation in credit and cash prices is

not generally an economically desirable system of pricing for retailers, it also indicates that a free market system is working.

Surcharges do not raise the issue of whether the free market will operate or not. Rather, the issue raised is whether that system will be structured such as to allow fair competition between retailers based on a consistent "regular" price and fair competition between credit services operated by retailers and credit services offered by third parties.

As noted above, the use of the surcharge would allow retailers to unfairly promote their own credit services over the credit services offered by third parties. This danger inherent in surcharges is not so prevalent with the discount. A retailer offering a discount for cash in lieu of the use of a bank card, would not incur the wrath of customers as in situations where that credit customer is surcharged.

This deregulation-free market argument is also hampered by the positions of its advocates on other free market issues. Many of the consumer groups who make this free market argument bring to the argument a history of opposing other actions in opposition to allowing the free market to operate. Their opposition to eliminating usury ceiling (pricing restrictions on credit) is the most notable example of this history. As noted in the Board Study, deregulation of interest rates and fees would naturally lead to a reduction in merchant fees for card transactions that proponents of authorizing surcharges allege is leading to the purported subsidy. Yet, we have not heard these groups calling for deregulation of credit rates overall.

One of the real questions remaining, is how far proponents of the surcharge are willing to carry the free market argument. If the current prohibition on surcharges expires as scheduled, merchant banks would not be

prohibited from contracting with retailers in a manner that would prohibit surcharges. Would the proponents of surcharges support allowing the free market to continue to operate in this area? Would the proponents of surcharges support the elimination of state laws limiting the price consumers are charged for credit?

In summary, there are many prohibitions in law that prohibit unfettered pricing on the part of retailers. These laws are justified where they promote fair competition rather then inhibit competition. Our antitrust laws provide numerous examples of laws that promote fair competition. A prohibition on credit surcharges will promote fair competition while allowing the free market to operate through cash discounts.

II. Authorization Of Surcharges Would Not Reduce Inflationary Pressures.

The argument regarding inflation asserts that the vast increase of consumer debt in recent years has contributed to the inflationary pressures in the economy and that the purported "subsidy" paid by cash purchasers represents a hidden cost of that credit — a cost of that would presumably be eliminated should surcharges be authorized. This argument contains three major defects.

First, there is no evidence that consumer credit has been a contributing factor in the monetary inflation. In fact, evidence clearly refutes this myth. Viewed nationally, consumer credit has indeed grown tremendously since the use of credit cards became wide-spread. But that growth in consumer credit has not outstripped the growth in wages and incomes. In short, as consumer credit has grown, so has the means for repaying it.

Consumers liquid assets, including currency, demand deposits, and

money market mutual funds shares, which are all readily accessible, grew at about the same pace as consumer credit in the 1960's and 70's up to the present. As a percentage, installment credit (including credit card credit) was 18.5 percent of liquid assets in 1981. This is virtually the same percentage as existed in 1960, the last year of the Eisenhower administration, when it was 18.6 percent. (See attachment #1).

Another means of determining whether or not consumers are using credit to fuel inflationary pressures is to look at the ratio of repayments of consumer credit to disposable personal income. The ratio of repayments to available income shows that installment credit repayments began to consume a slightly higher proportion of income in the late 1970's but the increase was small, the ratio peaked in 1978 and has been falling ever since. (See attachment #2). Clearly, the myths about consumer credit fueling inflation are just that, "myths".

Second, this argument assumes that retailers are charging greater prices overall because of the use of credit cards. As we develop in the attached analysis of the Federal Reserve Board Study (attachment #3), there is as yet, no evidence that cash purchasers are in any way subsidizing credit card users. In fact, the weight of evidence is to the contrary.

Finally, the argument assumes that all of the retailers would, in fact, separately price credit transactions and cash transactions if surcharges were authorized, thus discouraging the use of credit. As has been noted, retailers now have that opportunity through the use of cash discounts to separately price credit transactions. Very few find any incentive to do so. Further, the Federal Reserve Board Study indicated that only three out of ten merchants thought surcharges a better approach to two-tier pricing than cash discounts. Clearly, while some retailers may

make deceptive or abusive use of the surcharges, retailers in general would not utilize it as a means of separately pricing two basically similar transactions.

III. Cash Customers Are Not Forced To Subsidize Credit Card Users.

The argument that cash customers are subsidizing credit card customers is discussed in the attached analysis of the Federal Reserve Board Study. We simply note here that there is no substantial evidence that cash transactions are more expensive than card transactions. Further, the weight of evidence suggests that retailers are able to increase their sales and thereby reduce prices through the use of credit cards.

Also, it is important to note that with an increasing number of states offering usury relief and authorizing annual fees, the merchant fees charged by banks have declined appreciably. These reduced charges will insure that costs for cash and credit card transactions are even more closely aligned. Where such is the case, retailers have no economic incentive to impose surcharges except for deceptive or abusive purposes.

Further, even assuming higher costs for card transactions and no incremental sales, evidence suggests that retailers would not profit from two-tier pricing and would not make it available generally. In 1982 Charles Ingene and Michael Levy developed a methodology for retailers to determine when a two-tier pricing system would be profitable. If that methodology is adapted to current market conditions on interest rates and average merchant fees, profitability of such a system disappears entirely. (Charles Ingene and Michael Levy, "Cash Discounts to Retail Customers: An Alternative to Credit Card Sales", Journal of Marketing, Vol. 46 (Spring 1982), pp. 92-103).

Problems Associated With
The Failure To Extend The Surcharge

The Association strongly supports a permanent prohibition on credit card surcharges. However, there are a number of particular consequences that will result from the failure of Congress to act before February 27, 1984 when this surcharge is currently scheduled to expire.

- o card issuers may be found in violation of state laws if the courts determine that a surcharge is "interest" for purpose of state usury laws.

If surcharges are authorized without additional remedial legislation by Congress, retailers would be free to impose the surcharges. However, card issuers who are also imposing a finance charge associated with a particular transaction, may be subjected to penalties under state usury laws because of the surcharge. State courts or state attorney generals could find that a credit card surcharge is a charge associated with the use of credit and therefore fits within the definition of interest for purposes of that state's usury law. Card issuers would be in the untenable position of being faced with penalties for charges over which they have no control and, in some cases, no knowledge.

Under section 171(c) of the Truth-in Lending Act a state is prohibited from considering a discount for cash as "interest" or a finance charge for the purpose of the state's usury law or any other state law. No similar provision exists for credit card surcharges.

- o Card issuers could be found in violation of Truth-in-Lending disclosure requirements where surcharges are imposed by a retailers.

A surcharge for credit imposed by retailers could put card issuers in violation of Regulation Z disclosure requirements. Section 226.4(a) of Regulation Z, provides that a finance charge includes any charge imposed as

an incident to a extension of credit. Courts, and even the Federal Reserve Board, could find that a credit card surcharge fits within that definition. If a court determines that a surcharge imposed by a retailer is a finance charge, card issuers who operate the credit plan and collect the surcharges may be in violation of Regulation Z and subject to civil penalties under the Act. Again, as with violations of state usury laws, the creditor could be held responsible for a violation that was not within its knowledge or control.

Section 226.4(c)(8) of Regulation Z provides that a cash discount is not treated as a finance charge for purposes of Regulation Z. Under this and other provisions, issuers are under no obligation to disclose such discounts. No similar exclusion exists for credit surcharges.

- o Consumers would be faced with undisclosed, unexpected charges when paying by credit card.

As we have described above, credit card surcharges represent an addition to a "regular" price. If this addition to the regular price is authorized without imposing limitations or disclosure requirements, consumers may be faced with unexpected and in some cases exorbitant surcharges without a fair opportunity to object. Diners in restaurants may be faced with unexpected additions to disclosed menu prices only after having obligated themselves to pay for a meal. Purchasers of repair services may be faced with unexpected additions to agreed upon repair prices when presenting a credit card for payment. In some cases, the purchaser of repair services will have no alternative except to pay by credit card.

In summary, without additional remedial legislation by Congress the expiration of the prohibition will impose unreasonable and unconscionable results for card issuers and consumers.

Conclusion

We urge this Subcommittee, and indeed, the entire Senate to carefully consider legislation with respect to credit card surcharges. Action before February 27, 1984 is crucial. The uncertainties of an expiration of the surcharge prohibition is unthinkable. We further urge the Senate and this Subcommittee to look carefully at the superficial arguments regarding the need for surcharges. Credit card surcharges will be used unfairly against consumers and against the issuers of third-party cards. Our ability to please our customers and to provide a convenient payment mechanism in connection with a credit product is dependent upon the continued prohibition of surcharges.

Summary and Analysis of
Federal Reserve Board Study
on
Credit Card Surcharges

When Congress extended the prohibition on credit card surcharges in 1981, the Federal Reserve Board was directed to study the effect of charge card usage on the pricing of goods and services. Recently, in response to Congress, the Board released its study: Credit Cards in the U.S. Economy: Their Impact on Costs Prices and Retail Sales (hereafter cited as Board Study). Far from ending the controversy over surcharges, the Board Study fails to decisively resolve many issues and will likely provide additional ammunition for both opponents and proponents. This memorandum seeks to examine the conclusions and findings of the Board Study and assess its value in determining the need for a prohibition on surcharges.

The major findings of the Board Study can be summarized as follows:

- o credit card transactions cost most retailers more than cash (or check) transactions. (See Board Study, p.7).
- o this increased cost is not offset by higher retail sales volume for the retailing community as a whole. (See Board Study, p.8)
- o total sales might be expected to incorporate a premium for credit costs ranging from less than 1/2 percent to perhaps 1-1/4 percent, some part which would still be borne by credit card users in proportion to their 15 to 30 percent share of total sales. (See Board Study, p.61).
- o about 1/4 of gasoline stations and 6 percent of other retailers offer discounts for cash. (See Board Study, p.91).
- o only 41 percent of all retailers describe discounts for cash as a "good idea". (See Board Study, p.100).
- o 3 out of every 10 retailers thought that surcharges for credit constituted a better approach to two-tier pricing than discounts for cash. (See Board Study, p.101).

The Board Study examined two possible methods of minimizing the purported 1/2 to 1 1/4 percent subsidy; (1) removal of government imposed pricing restrictions on finance charges and other usury fees for credit

cards and (2) establishment of a two-tier pricing structure involving discounts for cash or surcharges for credit. The Board Study drew no conclusions with respect to these approaches. However, the Board Study did note that with the assessment of user fees (annual fees for credit card) and with the increases in finance rates since 1980, more of the cost of credit card operations has been gradually shifted to the users of credit cards. (See Board Study, p.73).

Although, the Board Study drew no conclusion regarding the desirability of two-tier pricing systems, it did cite an earlier study which examined the conditions under which discount for cash could be advantageous to a retailer and noted that under current conditions brought about by increased annual fees and finance charges and reduced merchant fees, the benefits to the retailer of the discount for cash disappears entirely. (See Board Study, pp. 89-90).

I. No Reliable Evidence Exists That Third Party Credit Card Transactions Cost Retailers More Than Cash Or Check Transactions.

The Board Study's conclusion that credit card transactions were more expensive than cash transactions is based on three previous studies and a 1983 survey of retailers conducted by the Survey Research Center at the University of Michigan on behalf of the Board. The prior studies do not support the dual conclusions of the Board Study that there are greater costs for credit transactions and that no incremental sales were experienced by retailers due to acceptance of credit cards. In fact, two of the studies[1] arrived at directly opposite conclusions.

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10. Payment Systems, Inc., Cost of Cash: A Strategic Analysis (Atlanta, 1981) and Robert M. Grant, "Transaction Costs to Retailers of Different Methods of Payment. Results of a Pilot Study" (Report prepared at the City University, London, 1982).

The study by Payment Systems, Inc. concluded that "The per retail transaction costs of credit cards and cash is near the same - about 45 cents - and checks only carry a small margin of higher costs." The Board correctly notes that many of the major costs associated with all billing systems were excluded from this study. The study did not examine security costs and theft losses with respect to cash, did not analyze merchant discount fees for third party cards, and did not consider losses on uncollectible checks. Finally, it did not consider billing, collecting bad debts and other expenses or the use of capital for in-house card plans. Without considering these major costs and without studying the effect of various payment mechanisms on incremental sales, the conclusion of the Board Study does not flow from a study that indicates "handling" costs for various payment methods may be similar with a slight advantage to credit cards (1¢ per transaction). (See Board Study, p.43).

The study by Grant also fails to support the conclusions of the Board Study. The Grant study concluded that net costs for credit cards were substantially less than net costs for cash transactions. In fairness, Grant did conclude that the fixed costs of card transactions exceeded the costs of cash or check transactions but went beyond to find that the slightly higher fixed costs were reduced by net additional sales which more than offset the cost of the use of credit cards. The Board Study relies on the finding of Grant that fixed costs of card transactions exceed direct costs for cash transactions by approximately the amount of the merchant discount fee but dismisses, out of hand, Grant's conclusion that the net cost for credit card transactions is significantly less than the cost for cash transactions.

The Board Study rejects without examination Grant's conclusion because Grant only assumed that there are incremental sales attributable to acceptance of credit cards and did nothing to show that that assumption was correct. However, as is discussed more extensively below, both common perception and available data indicate that at least some percentage of sales would be lost to a retailer who refused to accept credit cards: a finding that gives validity to Grant's assumption. The percentage of sales Grant used to reach his conclusion (20 percent) certainly would be open to question and was not subject to verification in his study. However, his assumption obviously has merit. By dismissing the assumption, the Board Study erroneously concludes that credit transactions are a net cost to the retailer, a conclusion directly opposite the conclusion of the study.

Grant found that the net cost of a cash transaction was 1.56 percent of revenues but that acceptance of bank credit cards reduced costs by 1.66 percent. In other words, an acceptance of a credit card yielded an additional 3.17 percent of sales to the retailer. (See Board Study, table 4.4, p.45).

Another study relied upon by the Board Study in reaching its conclusion regarding the cost of card transactions (the Touche Ross & Co. study[2]), made no attempt to assess the relative cost of cash or credit transactions. The study simply attempted to determine whether or not retail stores in New York were collecting sufficient finance charge revenues on their revolving credit accounts in order to cover the costs of extending and servicing such accounts.

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2. Touche Ross & Co. "Economics of New York State Retail Store Revolving Credit Operation for the Fiscal Year Ended January 31, 1973", in Robert D. Shay and William C. Dunkelberg, Retail Store Credit Card Use in New York. Studies in Consumer Credit, No. 4 (Graduate School of Business, Columbia University, 1975).

Clearly, to the extent that an in-house credit product is improperly priced, that improper pricing could be reflected in an increased cost of goods and services. However, the study made no attempt to assess the relative costs of different payment mechanisms. Nor did it cover third party cards, where deficiencies in revenues cannot be offset by increasing prices.

Having demonstrated that the source studies cited by the Board Study do not lead to the same conclusions drawn by the Board, we turn to the remaining evidence cited by the Board Study - the Board's survey of retailers. The Board's own survey has several deficiencies that call its conclusions into question:

First, the survey format served to heighten the respondents awareness of the cost of credit card sales by asking respondents to specifically designate the merchant fee paid to the card processor on third party credit cards as part of the background information. (See Board Study, p.47). By drawing the respondents attention to this fee early in the survey process, the survey's objectivity may have been jeopardized. Respondents, cued by the early question regarding merchant fee, could have been pre-disposed to focus on the costs connected with credit card sales.

Second, the survey results are skewed by the failure to include airlines and hotels. These businesses generally deal in large ticket credit card transactions, experience lower discount fees and otherwise have lower costs for credit transactions. Common understanding is that the size of the merchant discount fee is inversely correlated to the size of the average credit transactions involved. However, this relationship is not explored by the Board Study.

Finally, the major defect in the Board's survey is its failure to quantify cost figures and its corresponding reliance on "perception". The Board Study's less than empirical conclusion on the survey is stated as follows:

> On the whole, then, retailers showed broad agreement in considering credit cards to be more costly mode of transaction than cash, and a majority believed cards to be more costly than checks as well. (pp.54-55). (Emphasis added).

The fact remains that there is no quantification of the costs so necessary to reach the conclusions drawn in the Board Study. The original purpose of this Congressionally mandated study was to obtain some quantification of costs and a quantification of the effect of credit card sales on a retailer's profits or sales. By relying primarily on retailer perception, the Board Study fails in achieving this Congressional objective.

While the perceptions of the retailers in the Board's survey may be honestly held, further evidence demonstrates that it is unwise to draw conclusions from those perceptions. The Board's survey questions that dealt with cash discounts highlight this. Of 712 respondents to the Board's survey, only 61 offered some sort of cash discount. When gasoline stations were excluded only 39 of 620 offered such discounts (only 6 percent). Four percent of the respondents had once offered discounts but no longer did so. A larger group (about 18 percent) had considered offering discounts for cash but had rejected the idea. (See Board Study, p.97). These statistics indicate a clear lack of economic interest on the part of retailers for charging two different prices -- a credit price and a cash price. At the same time, 41 percent of the respondents perceived the offering of discounts as a "good idea". (p.101). Clearly, the retailers

perceptions in this situation do not translate into economic realities. Otherwise, far greater numbers would be offering discounts for the use of cash.

II. The Board Study Incorrectly Concludes That Credit Cards Do Not Generate Incremental Sales.

Assuming for purposes of argument that the purported higher costs for credit transactions do exist, the Board Study makes a major error in its approach to the consideration of incremental sales due to credit cards. Congress charged the Board with providing relevant information on "the effects of charge card transactions on retail sales" and the effect of charge card usage on...merchants,...". The Board Study takes only a macroeconomic view of the issue of whether or not credit cards generate increased sales and does not even attempt to analyze the effect on an individual retailer of that retailer's decision to accept or reject credit cards.

The conclusion of the Board Study is best summarized by the following statement from the Study:

> On the whole, the household survey on unplanned purchases discussed above, as well as existing macroeconomic research, provides little grounds for believing that credit cards generate incremental sales in sufficient volume to offset credit card costs to any measurable degree. (p.31).

The effect on individual retailers is dismissed by the Board, as immaterial to the discussion:

> ...[I]f most merchants honor credit cards, as may be true today, then none enjoys an advantage over any other by doing so, and competition must focus upon other factors....In this situation, any selling costs incurred from honoring cards, above the cost of selling for cash, could be regarded as a net additional cost, in view of the absence of any offsetting incremental sales revenue for the industry as a whole. (p.34).

This macroeconomic line of reasoning dominates the Board Study to the exclusion of other more relevant information and common sense considerations. Their conclusion regarding total sales volume for all retailers is probably valid but their conclusion regarding acceptance of cards and competitive advantage is suspect. Rather than the macroeconomic effect of credit cards on aggregate savings versus spending or the rate of inflation, the Board Study should have focused on the effect of acceptance or non-acceptance of different payment mechanisms on a retailer's competitive position in the marketplace.

When this microeconomic approach is used, the only conclusion that can be logically reached is that retailers gain a competitive advantage in the vast majority of markets by accepting credit cards. That competitive advantage translates into increased sales. Many emperical facts, as well as perceptions cited in the Board Study, support this analysis.

- Of the respondents to the Board's survey of retailers, nearly 80 percent accepted third party cards. (See Board Study, p.48). Clearly, the wide acceptance of these cards indicates there importance in competition.

- On the other hand, with 20 percent of retailers not accepting credit cards, it is clear the competition based on payment mechanism still exists. (See Board Study, p.34).

- In a 1983 Board survey, 20 percent of the individual respondents who had credit cards (52 percent of all respondents) reported that they "always" used a credit card to buy gasoline. (See Board Study, p.79). Can retailers ignore this significant percentage of the market without suffering some competitive disadvantage? Further, the percentage of individuals who always use a credit card would likely increase when the dollar amount of the transaction involved is greater (hotels and airlines, for example).

- Approximately two-thirds of the households in the United States hold credit cards of some type. The Board's 1977 Consumer Credit survey indicates that approximately one-half of card holders used cards only for convenience (in other words, they use them only as a payment mechanism and not as a means of making installment payments). (See Board Study, pp.20-22). With one-third of the

> buying public holding credit cards for the purpose of achieving convenience in payment, it is clear that a retailer can achieve some competitive advantage and corresponding incremental sales by accepting credit cards.

Other evidence indicates the folly of the solely macroeconomic approach of the Board Study. For example, the retailer "perception" relied upon by the Board Study in reaching conclusions on costs is ignored when reaching conclusions on the effect of card acceptance on incremental sales. The general perception of retailers is that acceptance of credit cards is advantageous because of their effect on sales. The Board Study acknowledges this fact with the following statements:

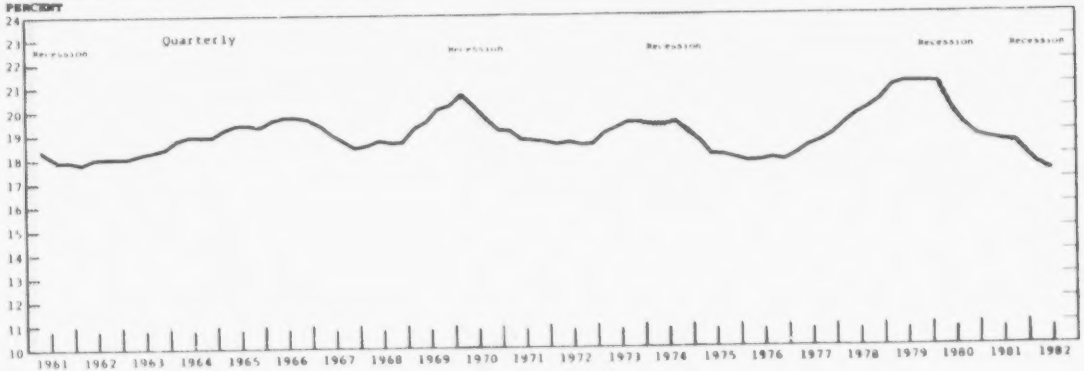
> For both in-house and third party credit card plans, generation of incremental sales above the cash-only volume was the dominant consideration underlying their adoption. (p.33).

> In practice, the sales generation motive appears to have been the dominant consideration underlying selling on credit. (p.32).

The fact that 80 percent of all retailers accept third party cards and perceive that those cards generate an increase in sales or protect a level of sales that maximizes profit potential cannot be ignored as the Board Study has done.

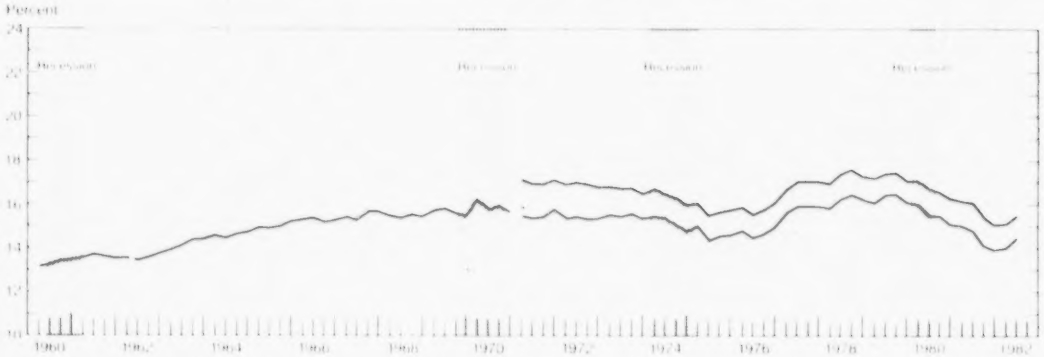
Admittedly, credit cards may not have a significant effect on total sales volume for all retailers. But this macroeconomic conclusion is simply not relevant to the issue of two-tier pricing of credit transactions. On the other hand, information on the impact of credit card acceptance on individual retailers, on different product lines, or on different market segments would have been useful.

Ratio of Consumer Installment Credit Outstanding to Consumer Sector's Liquid Assets



American Financial Services Association Chart. Source: Federal Reserve Board

Ratio of Repayments of Consumer Installment Credit to Disposable Personal Income



*Excludes Gasoline Companies
American Financial Services Association Chart
Source: Federal Reserve Board and Department of Commerce

Senator GORTON. Thank you.
Mr. Greenberg.

STATEMENT OF DAVID I. GREENBERG, LEGISLATIVE DIRECTOR, CONSUMER FEDERATION OF AMERICA

Mr. GREENBERG. Thank you, Senator Gorton. We'd like to welcome you to the chair of this subcommittee and also say hello to Senator Proxmire who we have worked with in the past on this and a variety of other consumer issues.

As you both know, Consumer Federation of America is a nationwide coalition of over 200 consumer, senior citizen, low-income, union, farm, public power, and cooperative organizations.

These groups and the 35 million people they represent are affected each and every day by the benefits and cost of both credit cards and the Cash Discount Act.

[The complete statement follows:]

STATEMENT OF DAVID I. GREENBERG
LEGISLATIVE DIRECTOR
CONSUMER FEDERATION OF AMERICA

Mr. Chairman and Members of the Subcommittee, Consumer Federation of America is pleased to have the opportunity to testify on the Cash Discount Act. Our 200 consumer, senior citizen, low-income, union, farm, public power and cooperative organizations, and the 35 million people they represent, are affected each and every day by the benefits and costs of both credit cards and the Cash Discount Act.

Perhaps no other issue in the banking/credit area generates as much confusion as the controversy concerning credit surcharges. CFA itself was victimized by that confusion, supporting the original surcharge ban in 1975, then changing course in 1981 and arguing that Congress should allow the ban to expire. Whatever the source of confusion in the past, there is no confusion now. Our position is firm: the surcharge ban is neither appropriate nor fair; it undermines the purpose of the Cash Discount Act, and it misleads consumers about the true costs of credit. As far as we know, all consumer groups who have spoken on this issue share our view.

CFA has three fundamental objections to the prohibition on surcharges: (1) It obscures the true cost of credit and forces cash customers to subsidize credit customers; (2) It penalizes low-income consumers, who are far less likely to qualify for and use credit cards; and (3) It discourages many merchants from experimenting with two-tier pricing. Let me examine each of the points in turn.

First, buying with credit costs more than paying cash. The so-called merchant discount means that credit card purchases cost anywhere from 3% - 6% more than cash purchases. While there may be some costs associated with cash and check buying, in the aggregate these are simply nowhere near the magnitude of the merchant discounts attributable to credit card sales. Estimates of the total cost vary, but the conclusion is clear. Credit purchases cost in the neighborhood of $1 billion more than cash purchases.

Nevertheless, this additional cost is invisible in the marketplace, hidden in the overall prices of products. Both cash and credit customers are misled.

Cash customers have no idea that they are subsidizing credit card users. Credit card customers have no idea that the actual cost of credit cards is even higher than what is reflected in their annual membership fees and monthly finance charges.

The marketplace simply cannot work optimally when a major cost is buried in this manner. When major credit card costs are folded into everyone's retail prices, economic signals about the costs and consequences of credit cards are muted, if not totaliy silenced. Without those specific orice signals, marketplace behavior becomes distorted.

It is appropriate to ask at this point: Does the distortion inherent in hiding 3% - 6% of the cost of a credit card transaction really matter? The most persuasive evidence that it does cannot be found in either the Federal Reserve Board study or in economic textbooks. But that evidence is plain from the political makeup of this legislative fight. The intensity of the concerns of the companies who fear they will be hurt -- banks and credit card issuers -- shows persuasively that they think the true costs of credit do matter and that those costs, if disclosed, would change marketplace behavior. It appears that they believe surcharges would trigger a reduction in credit card purchases and a corresponding reduction in the merchant discounts generated, i.e., their revenues would fall.

I tend to agree with their analysis, but that is not the point. Our support for lifting the surcharge ban is not anti-bank or anti-credit card, it is pro-free market. We have nothing against credit cards or credit card companies, but we do not believe in subsidizing them anymore than we favor milk, sugar or tobacco price supports. Credit plays an important and useful role in our economy. But there is no reason that it cannot pay its own way.

Our second objection to the surcharge ban grows out of our analysis of who wins and who loses as a result of the hidden costs of credit. The Federal Reserve Study reports that seven of ten American families have and use credit cards. That

means three of ten do not. It stands to reason that the overwhelming number of people who do not use credit cards are those whose incomes and credit histories deny access to credit -- in short, the poor. These customers are forced to share the costs of credit, yet they receive none of the benefits. It is not unfair to conclude, then, that the ban on surcharges helps create a situation in which the poor subsidzie the rest of us. CFA believes that situation is unacceptable.

Our third problem with the surcharge ban relates to the confusion it generates. The Cash Discount Act allows discounts for cash but prohibits credit surcharges. Yet, economists continually tell us, there is no real difference between the two. As a consequence, merchants may well be inhibited from engaging in two-tier pricing, fearing that their interpretation of a cash discount may be someone else's notion of a credit surcharge. Faced with that legal uncertainty, many retailers probably conclude that prudence (and their lawyers) dictates no program of two-tier pricing. If that is the case, then the ban on surcharges creates a disincentive for cash discounting as well. At minimum, the paucity of cash discount programs outside the gasoline industry is evidence that <u>something</u> is creating retail reluctance about two-tier pricing. We believe the surcharge ban plays a contributing role.

In conclusion, Mr. Chairman, CFA favors the elimination of the surcharge ban. The question we are left with is one of timing -- whether or not the ban should expire at the end of this month. We know that there are questions in the petroleum industry about the impact of state usury ceilings and truth-in-lending requirements on those who would decide to impose credit surcharges. From my reading of the issue, these concerns are legitimate, although CFA does not necessarily support the preemption of state law as the solution. In addition, some of our members have raised their own questions about the need for uniform, adequate disclosures regarding surcharges, as well as appropriate programs of consumer information and education about surcharges. (See attached letter and memo from the Concerned Consumers League of Milwaukee.) As a consequence, CFA would

be willing to support a delay in the effective date of the expiration if that delay were accompanied by a formal study of these remaining complexities.

We believe the study should involve members of all affected constituencies, address a series of concrete questions, and report back to this Subcommittee within a specified period of time. We will be glad to work with any such group to allow the surcharge ban to be lifted without undue damage to merchants, consumers, and the banking industry.

CFA thanks the Subcommittee for the opportunity to present its views. We look forward to working with you in the future.

Senator GORTON. Thank you, Mr. Greenberg.

Mrs. McLaughlin, the ABA is before this committee frequently on a number of banking issues. Generally speaking, the ABA witness points out to us the immense cost imposed by existing or proposed Government regulations.

PREVENTING RETAILERS FROM OPERATING IN A FREE MARKET

In this case, however, you are supporting a law which prevents retailers from operating in a free market.

What's the difference? Why not just let the free market work here as you so eloquently ask it to work in so many other areas?

Mrs. MCLAUGHLIN. We believe, Senator Gorton, that the free market is in fact working through the vehicle of cash discounts. I think the history of the ABA's interaction with this committee has never put the ABA in a position of arguing in favor of deregulation where that creates an unfair situation in the marketplace, and we believe this one does.

In fact, we have often taken the position, as we do with truth-in-lending, for example, where we recognize that a consistent disclosure of certain terms related to the calculation of finance charges is a matter of both consumer fairness as well as a matter of consistency in the marketplace. So we find no inconsistency in our position today on the Cash Discount Act with our prior activities related to regulatory matters.

Senator GORTON. You argue in your testimony that surcharges present an opportunity for retailers to promote their own in-house cards at the expense of third-party cards. You state that they would charge for the use of third-party cards but presumably not for their own in-house credit cards. Those cards, of course, don't cost an extra 2 or 3 percent. They don't cost the merchant discount fee.

If surcharges were allowed, if we decide to go in that direction, what is wrong with allowing the retailer to recover that cost and to ignore it in connection with his own card?

Mrs. MCLAUGHLIN. Various studies, Senator Gorton, as well as my own experience in talking with retailers tells me that in-house cards don't cost 3 percent. They cost, in fact, a great deal more.

Senator GORTON. Then presumably they would exercise that option.

Mrs. MCLAUGHLIN. I have no way of knowing. I have no way of knowing whether they would or not. Just as retailers are interested in bank credit cards because of the marketing and promotion and goodwill that has been created by the two associations, they are sometimes interested in their own in-house cards for other reasons. One of the reasons I've heard frequently cited is that they believe that there is marketing value to you as a customer carrying a card with their name on it. To the extent that they believe that there is marketing value, they may very well be able to lend favor to their own card as opposed to the bank credit card. All we're really saying is they ought to be treated equally.

Senator GORTON. You haven't given me any rationale for that, however. Assuming that we are going to go in the free market in

this field, why shouldn't that simply be a matter of the retailer's own judgment?

Mrs. McLAUGHLIN. Throughout the arguments in the Fed study as well as some of the testimony I heard here this morning, Senator Gorton, there is an assumption that lies at the very core of the ABA's argument against the surcharge, and that assumption that I have heard articulated in several different ways is simply that there is no economic value to the merchant to honoring the card. The merchant honors the card because he believes it has competitive value to him. If that were not the case, I should say that there probably would be either everyone offering a card or no one offering a card. In fact, there's some 20 percent of the retailers who apparently believe there is not sufficient value to justify the charge paid to the bank.

If you believe, as we certainly do, that there is economic benefit to the merchant by way of the goodwill generated, by way of the systems that the two card associations and individual banks have put into place which preclude in most cases the need for the merchant to put those systems in place—if you believe there is a value to that, as we do, then there should be no particular hurdle in asking the merchant to pay a nominal sum for that value.

The sum is actually somewhat lower on average than Mr. Greenberg and others have identified. I believe the national average is now running at something like 2.8 or 2.9 percent, but there is a fee involved. We believe that fee is fair in exchange for the value that the merchant derives by honoring bank cards.

CONSUMERS COULD BE CONFUSED OR MISLED BY SURCHARGES

Senator GORTON. In your testimony you pointed out several potential situations involving surcharges in which consumers could be confused or misled. The consumer goes to a store advertising the $500 price which you examined and which you used but not until check out is he apprised of the 5-percent surcharge. Another example is a family eating at a restaurant is not aware until the end of the meal that the family is going to be charged extra for the use of that card.

In each of these situations, why wouldn't the requirement for adequate disclosure of the existence and the amount of the credit surcharge eliminate the confusion, perhaps even simply a requirement that in each place in which credit is advertised or where the VISA card appears in the window, there's a notation of 2 percent surcharge be included with it.

Mrs. McLAUGHLIN. First, it's difficult for me to acknowledge that the addition of another pricing option does anything but add confusion. There are a number of options today.

Now, would disclosure deal with the issue of confusion? It may to some extent. I don't think the issue at that point is really confusion. A retailer may choose to disclose, but if retailers are allowed to charge a variety of surcharges, one may charge 5 percent, one may charge 3 percent, one may charge 1 percent, the issue of buying something so basic as a television set may become sufficiently complicated that when the consumer finds the store with

the right price they may have used up a great deal more in time and energy and effort than the saving was really worth.

So while disclosure does indeed identify the level of surcharge being charged, it continues to complicate.

In the case of the person traveling, for example, or in the case of a person even going into a restaurant for a family meal, let's say, we find it difficult to believe in the case of the family meal that there's going to be an enormous amount of time devoted to choosing the restaurant based on price. There's a limit to how much effort and time anyone will put into choosing a restaurant for one meal.

If the consumer has the misfortune—I believe and we believe that the consumer in the case of something so routine as the family meal will probably not take the time to check. It simply is not worth it.

At the same time, that consumer when he or she walks into the restaurant is saddled with the higher price. What is he or she going to do once you have eaten the meal and now you go to check out or go to pay the bill and you discover the higher price?

Senator GORTON. Probably your best argument is take it out of the tip.

Mrs. MCLAUGHLIN. That hurts some of Mr. Greenberg's consumers in that and mine as well. Those are people making a living too.

In the case of the traveler, there simply is not a reasonable or practical way for a traveler who is going to, let's say, taking his family across country from the east to the west coast—there is no practical way for him to check the hotels and the restaurants in advance on the basis of who charges—not only who charges a surcharge, at what level are they charging a surcharge, and maybe even who's charging the regular price and who's charging the cash discount.

The truth of the matter is, for a person engaged in a leisure trip of that sort, that probably is not going to happen. We believe that's unfair.

Senator GORTON. Bill, I'll defer to you and I will take Mr. Greenberg on my second round.

Senator PROXMIRE. Mrs. McLaughlin, first, I want to congratulate you on your frankness in saying you're not interested in delay. You want to kill it. You just want to kill permanently any authority for a merchant to provide for a surcharge on credit cards.

Mrs. MCLAUGHLIN. Senator, we are in favor of a permanent ban on the surcharge; that's correct.

Senator PROXMIRE. Well, now, as I say, I think that's a frank, clear, understandable position and I want to talk to Mr. Greenberg a little later about his position that we ought to delay it once again after delaying it four times in 8 years, studying some more, but I'll come to that when I come to Mr. Greenberg.

FREE MARKET SYSTEM CAN WORK WITHOUT SURCHARGES

You said, Mrs. McLaughlin, that the free market system can already work through the mechanism of cash discounts. Cash discounts would be enough. We shouldn't permit in addition to that a surcharge on credit cards.

Why isn't that akin to calling it a fair fight when one party has to fight with one hand tied behind his or her back? As Mr. Greenberg testified and as Mrs. Teeters did too, some merchants are afraid to offer cash discounts for fear their actions would be interpreted as violating the ban on imposing a credit surcharge.

Mrs. McLAUGHLIN. I'm not sure I understand your question, Mr. Proxmire. If your question is why is that not a fight with one hand tied behind the back, it seems to me that as long as the merchant is able to make a price differentiation for the credit card customer versus the cash customer, then I don't see that he is inhibited in any sense of the word competitively in the market.

It seems to me he does, in fact, have the opportunity to charge two prices.

If the issue is that the merchant is unclear on what is a violation of Federal law or what's going to somehow get him in trouble, there are certainly ways to clarify that kind of confusion.

Senator PROXMIRE. Why should the Federal Government butt in? Why should it tell the merchant he can't charge for a cost that requires him to reduce his income and impose a further cost? Why shouldn't he be allowed to do that? Why should we butt in and say he can't do that?

Mrs. McLAUGHLIN. I think we have a long history, not so much of the Federal Government butting in, but of the Federal Goverment——

Senator PROXMIRE. We sure do.

Mrs. McLAUGHLIN. Well, that may be true, but of the Federal Government in its appropriate role taking action that assures fairness in the marketplace. Certainly in our business we see that kind of action all the time. I earlier cited one to Senator Gorton where we understand the need, for example, for truth-in-lending legislation because it insures a consistency and a fairness out there in the marketplace. We see this as being precisely the same kind of issue.

Senator PROXMIRE. But the ABA, for example, is very vigorous—and I agree with the ABA—in supporting repeal of all State usury ceilings.

Mrs. McLAUGHLIN. Yes.

Senator PROXMIRE. I agree with you. I think that's right. We should repeal them because that's a form of regulation that interferes unwisely, it seems to me. There may be a case for it, but I don't support that case, but yet you come down in favor of a price regulation banning credit card surcharges.

Mrs. McLAUGHLIN. The truth, Senator, is that our perception is that the repeal of State usury legislation is going to be very difficult to achieve in the House.

Senator PROXMIRE. I agree with that, but I think you ought to still try to repeal it and I'll do all I can to help you.

Mrs. McLAUGHLIN. We appreciate that very much. At the same time, that has not occurred. We are highly regulated in individual States in 50 different ways on the extension of credit. We frankly see our position on the ban of the surcharge and we see the rationale behind that as being not unlike other things which the merchant buys to conduct his business.

Take as an example the merchant who sustains parking lot space. Depending upon where he's located, that may be more or

less expensive. It does not benefit those persons who are taking public transportation to do their shopping. And yet the cost of that parking space is part of his cost of doing business.

We regard the cost of credit cards, the cost of handling cash—and that's another issue that has not been touched upon here—believe me, there is a cost associated with handling cash, there's a cost associated with handling checks. We see the cost associated with handling the credit transaction as being a part of that array of business expense which he incurs for benefit.

Senator PROXMIRE. Why do you have to have the Federal Government move in? You don't have the Federal Government imposing any kind of limit on parking fees. It might equalize it there. It seems to me that the merchant ought to be free, unless there's some clear discrimination against a class of consumers. Mr. Greenberg has made the case very strongly that all we are asking for is fairness, equal treatment.

Mrs. MCLAUGHLIN. I think indeed there is an issue of the credit user paying additional at the retail outlet when the reason for the program, the Mastercard, or VISA, or American Express, or whatever it may be—when the reason for the installation of the program is indirectly to the consumer's benefit but directly to the merchant's benefit who perceives that he will indeed attract more sales by the installation of the card programs. It seems appropriate that he pay for that benefit.

Senator PROXMIRE. I have some other questions for Mr. Greenberg. I'll wait until the chairman has an opportunity to ask his questions.

IMPACT OF SURCHARGES ON THE TRAVELER

Senator GORTON. Mr. Greenberg, I'd like to start out by asking your response to the example of the traveler, the person who is dealing with and the business who is dealing with the consumer without substantial repeat business. Are we making it more difficult for the traveler? Are we going to be making it better for purse snatchers and muggers by having more people carry cash and fewer carry credit cards? Are we inhibiting that kind of business if you allow for this surcharge in the face of people who travel a great deal with a fairly persistent and substantial added cost of using credit?

Mr. GREENBERG. Maybe we'll just be giving a little boost to the travelers check industry, but I guess what I really think is that most of the transition involved in moving from the world as we now have it to the world where merchants are free to surcharge will be a one-time event. Some people may be shocked the first time. I think that the business traveler is among the least likely to be shocked because large businesses have people who think all the time about how to conserve on the cost of travel and what corporate travel arrangements should be made.

I also think that restaurants and other establishments that tend to serve the out-of-town traveler may take a different view of their freedom to impose a surcharge and they may decide not to do it, for precisely that reason; but I don't think this example or any of the examples is sufficient to support a continuation of the ban.

Senator GORTON. What about the bait and switch argument? What about the question I raised with Mrs. Teeters? Do you envisage allowing a different charge for different credit cards? Do you envisage allowing surcharges for different users of the same class of credit card?

Mr. GREENBERG. No. We think that different classes of credit card customers pay those differential costs in other parts of their relationship with the card company. In other words, if they are more risky, for instance, their credit limit is smaller. If they use the card excessively and don't pay, those extra costs are reflected in late charges. So I guess we see the surcharge issue as a cost-based issue and to the extent that costs are uniform—in other words, if costs to the merchant are 2 or 3 percent for each transaction, then we think the surcharge would be imposed in that way. I haven't fully thought through whether we want to circumscribe the merchants' ability in the surcharge area. That gets us into one of the complications that I suggested earlier that we may need to look at and that I know I'll be speaking to Senator Proxmire about.

Senator GORTON. Assuming we go to a system in which surcharges are allowed, what do you think the appropriate rules of making disclosure are?

Mr. GREENBERG. Senator Gorton, I'm not sure. I think that ultimately the market would work a lot of it out, but I think that we might need to plan for the transition and also for the fact that as we see right now on cash discounting is not ubiquitous by any means, surcharging I think may make cash discounting more prevalent. I don't know how many merchants will actually engage in surcharging and so if there's a very small penetration of a surcharge it may mean that it doesn't actually come down to millions of consumers day-to-day experience for a while, and I think that that period is the one we have to be worried about.

Senator GORTON. The greatest fear I have in this respect is that while in theory this is a proconsumer idea, in practice, at least in many cases, the cash customers would not get a lower price but the cost to credit card users would nonetheless increase. Do you feel that the market is competitive enough so that that is an unfounded fear, that in fact to the extent that surcharges were used there would at least be a corresponding benefit to cash purchasers?

Mr. GREENBERG. I think our position is that if there is any market that we in the consumer movement look at as the most competitive it's the retail market. So if you were asking me this question about a variety of other industries, I might have a different response. But here I think that the margin is low enough and competition is intensive enough that it's not likely that gouging would work for a very long time or more than in a very few instances.

Senator GORTON. So you do think there is a consumer benefit?

Mr. GREENBERG. Yes.

Senator GORTON. Bill.

Senator PROXMIRE. Mr. Greenberg, what concerns me is if we delay this legislation, you lose. I think that's a serious mistake and blunder you've made in your strategy this morning. I may be wrong, but I think that's the case.

SUGGESTION FOR TEMPORARY DELAY IN EXPIRATION DATE

You suggest a temporary delay in the expiration of the surcharge ban while all parties to the controversy study how to overcome the usury and truth-in-lending problems. However, the distinguished witness on your right was remarkably candid, as I indicated to her, in saying that the reason the ABA wants a delay is not to study the issue but to get more time to convince the Congress that we need a permanent ban.

Since the credit community isn't really interested in a compromise solution, aren't we just kidding ourselves with a temporary extension? I've got great faith in the ability of the CFA persuading Congress, but I've got a lot more faith in the effect of the ABA and the powerful credit card companies and all the political action committees that lie behind them.

Mr. GREENBERG. I join you in your political views. Senator, what I said was that we would be willing to support what we thought was a good faith delay for a limited period of time where all parties agreed that that was it; we wouldn't revisit this issue; they made that commitment public to you and to other Members of the Senate and the House; and we looked at that period of time to figure out what we're going to do, not if we're going to talk about a further delay.

Senator PROXMIRE. Let me just interrupt, Mr. Greenberg, to say that the witness on your right has indicated and been very frank in telling us that they are not interested in delay to study and change; they're interested in permanently banning. I think she speaks with complete honesty and I think she certainly represents the views of the ABA in saying that.

Mr. GREENBERG. Senator, if that's the issue is cut, then we will support the expiration at the end of this month. And if there's no other choice and that's the way the industry wants to go, then we will be fully behind your position to just let it run out.

Senator PROXMIRE. Furthermore, you heard Governor Teeters testify this morning that the Federal Reserve recommended changes exempting surcharges from usury laws and truth-in-lending be adopted. If that's done, if we follow the Federal Reserve Board recommendations, do you see any disruption to our credit system if these changes go into effect upon the expiration of the surcharge ban later this month?

Mr. GREENBERG. Senator, the issue of the exemption from truth-in-lending and State usury ceilings just came upon us last week. As you may know, you like our position on usury about as much as we do your position on milk price supports.

Senator PROXMIRE. Right.

Mr. GREENBERG. Because of our reluctance to preempt usury ceilings, it's just something that we felt we would have to think through more before we could come up with a firm position, and that's the major reason why we have come forward with the position that I have today.

VIEWS OF CONSUMER GROUPS

Senator PROXMIRE. Now in your testimony you say that as far as you know all consumer groups who have spoken on this issue share

your view. We received for the record a statement from the consumer group called Bankcard Holders of America which represents 100,000 credit cardholders that favors retention of the surcharge ban. I know that your organization represents a big number of consumers. Could you tell me what other consumer groups favor a repeal of the credit card ban?

Mr. GREENBERG. Traditionally, at least in Washington, Senator, there has been CFA and Consumers Union. Consumers Union would be here today except for the fact that their Washington staff, both of their staff attorneys decided to leave at the same time and they are currently being replaced.

As far as I know, the Bankcard holders are the only group that calls itself a consumer group that has spoken out and taken a position for extension of the ban. I don't know enough about the Bankcard holders to comment, but I can just tell you that when we in Washington and around the country talk about consumer groups they have never been included in our numbers. That may be our mistake, but if they are testifying today I suggest you ask more about their membership, their funding and their other positions.

Senator PROXMIRE. I just have one other issue I'd like to ask you about.

Some of our witnesses today are endorsing a broader bill which would permit credit card issuers to impose transaction fees for the use of credit. Do you support or oppose such a system and why?

Mr. GREENBERG. I was impressed with Governor Teeters' argument on that and I'd just like to add one more. To the extent that the cost of credit in the whole surcharge issue is separated in time and space from the transaction, it's much less likely to have an effect. That might be only a one-time effect. But I think that we would prefer the approach of letting the ban expire rather than that approach.

Senator PROXMIRE. Well, let me ask you a little refinement on it. If card issuers could assess a transaction fee, they would try to use their leverage with retailers to try to force the cost of credit onto the entire universe buyers rather than the 75 percent who are credit card users. What would you think of prohibiting the merchant discount fee and authorizing transaction fees as a way of forcing card issuers to cover the cost of credit to its credit card customers?

Mr. GREENBERG. I think if you actually accept some of the things that the ABA is testifying, you might think about simply prohibiting merchant discounts from being passed on in any sense because clearly they're costs totally to the merchants so maybe they don't need to be passed on; but I don't think we want to go the way of tacking the charges on the back end because most of our members tell us that they feel in the whole banking area that they're being fee'd and charged to death and the amount of confusion is just becoming very, very intense. The connection between credit card costs and the credit card purchase is very apparent at the retail level if when you walk up and slap down your credit card you're told that it costs more and you know that, and I would just prefer not to see it separated.

Senator PROXMIRE. Thank you.

Thank you, Mr. Chairman.

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Senator GORTON. Thank you both very much for an extremely enlightening testimony.

Panel 2 will consist of Mr. Hammelman from Mastercard International; a representative of American Express; and Mr. Russell from VISA. As we have done with the other witnesses, your entire statement will be included in the record.

STATEMENT OF THOMAS N. HAMMELMAN, EXECUTIVE VICE PRESIDENT, NORWEST BANK, DES MOINES, DIRECTOR, MASTERCARD INTERNATIONAL INC.

Mr. HAMMELMAN. We appreciate the opportunity to present our views on the credit card surcharge issue especially in light of the approaching February 27 expiration date of the Truth-in-Lending Act surcharge ban.

[Oral and complete prepared statement follows:]

Oral statement of Thomas N. Hammelman

MasterCard International Incorporated

Before the Subcommittee on Consumer Affairs

of the

Senate Committee on Banking, Housing and Urban Affairs

February 7, 1984

Good day. My name is Thomas N. Hammelman. I am Executive Vice President of Norwest Bank Des Moines and a director of MasterCard International Incorporated, which I represent here today.

MasterCard International is a membership corporation of more than 12,000 U.S. financial institutions which issue and honor the familiar MasterCard credit card and MasterCard II debit card. We appreciate the opportunity to present our views on the credit card surcharge issue, especially in light of the approaching February 27 expiration date of the TILA surcharge ban.

Let us examine the arguments presented to support surcharges. They are only three:

1) In the opinion of some, a credit transaction is more costly than a cash transaction and thus, given one price, cash customers are presumed to subsidize credit card customers.

2) Surcharges could somehow be used as a tool to help contain inflation.

3) Surcharges are part of a merchant's pricing methodology that should be determined by free market forces.

We would like to discuss whether or not each of these stated intentions are accomplished by permitting surcharges.

Behind the first reason, that cash customers subsidize credit card acceptance, is the working hypothesis that credit cards represent an overall negative cost to the retailer. Although we do not agree with the study conducted by the Fed at the request of Congress that credit cards cost more than cash or checks (and especially, not more than check verification programs), for the purpose of argument we will accept the Fed's conclusion on this point. However, the Fed study simply and wholly is without any information on which to justify its key conclusion that card acceptance does not add sales for the merchant. This is key because if, in fact, card acceptance adds sales and profits, the cost associated with participation in a card program must be reduced accordingly and may yield a net positive position, contrary to the working hypothesis.

Considering that the Fed study determined that card-related costs result in less than one percent (1%) mark-up in a retailer's price, card acceptance need then only attract one percent or more sales volume (or such lesser figure) to result in a break-even situation as compared with other payment mechanisms.

Like the Fed, MasterCard does not possess any hard data showing whether or not additional transactions occur at a merchant because that merchant accepts a credit card. However, we have conducted studies of cardholder behavior and found that the average cash transaction is $35 and the average credit card transaction is $65. The difference in dollars spent is $30, a statistically significant figure. We will concede, though, that yet more information must be collected to comprehend the impact of card acceptance on the number and dollars of a merchant's sales.

Even if this working premise was correct, the lifting of a surcharge ban would not accomplish the desired result of reducing the cash customer's financial burden. There is nothing implicit or explicit in lifting the ban (or, in letting the law expire) which would assure that the actual costs of card use previously paid by cash customers would be extracted from the price to cash customers.

The second argument implies that lifting the ban is needed to halt inflationary pressures. We believe this argument is quite fragile. One need only look to the statistics of this past year to see that credit card use is up 13.7% while inflation closed out at 3.8% in 1983.

We respectfully suggest that there must be more appropriate measures available to control inflation than permitting card surcharges.

The third suggested reason for permitting surcharging is it is consonant with a philosophy that all pricing must be deregulated. MasterCard supports the philosophy of price deregulation and believes this objective has already been accomplished by facilitating the ability of a merchant to offer cash discounts. In keeping with the spirit of no government intervention in the marketplace, we wish we could support the surcharging practice. But, we have deep concerns about merchant surcharging which we must bring to Congress' attention.

Our first and foremost concern throughout this entire matter is with the welfare of our cardholders and the potential for confusion and abuse to which merchant surcharging may subject them.

Consider the following scenario: Imagine that an individual learned that a merchant was running an excellent sale on, say, a microwave oven, a competitively priced, frequently advertised item for which he or she has "shopped around". The customer read about the sale in an advertisement which clearly stated that this merchant accepts major credit cards, making no mention of any difference in price for card purchases. The customer makes a special trip to the store, incurring transportation and other expenses, planning to purchase the item with his credit card. He goes to the register to pay, only to discover <u>then</u> that the merchant is imposing a 5% surcharge for credit card use. If the oven costs $600, a 5% surcharge would add $30 to the cost, an additional charge which might not make the purchase worthwhile or competitive.

The problem here is not that there is a credit versus cash differential; the problem is that the consumer cannot properly pre-assess the total cost of the purchase. This example serves to explain how the lack of clear disclosure of the merchant's pricing policy can result in discriminatory, unfair treatment to credit cardholders. Moreover, the potential problems extend beyond facilitation of informed buying. By merely lifting the ban, and not at the same time prescribing any rules for uniform disclosure, surcharges can vary from merchant to merchant and, indeed, even from customer to customer. Furthermore, we must voice our concern over the potential legal jeopardy in which card issuers may be placed by the question of whether any surcharge permitted by the lifting of the ban, or mere expiration of the present law, is a finance charge under state law.

Inasmuch as the issuer, as a creditor, is liable for complying with state finance charge limitations, he may be held accountable for these surcharges which as a creditor he neither knows about, controls or benefits by. It seems hardly reasonable for Congress to put issuers into such legal straits by merely lifting the ban or letting it expire.

Another important reason why we cannot endorse merchant surcharging is that it serves to undermine the very purpose of the Trust-in-Lending Act: to inform consumers of the cost of credit and to enable them to comparatively shop for credit.

If the ban is lifted, or allowed to expire, one can assume that a variety of surcharges will take hold in the marketplace and

will vary along with market forces and economic changes. How then, can a potential cardholder know which credit plan will be most cost efficient for him or her?

With the date closely approaching on which this law expires, we wish to voice our plea. If the expiration of the law is merely ignored and allowed to expire, it will affect many parties in a very immediate, direct and adverse fashion. It would, with the first surcharge, put our members in legal jeopardy under the state usury laws, as we mentioned. It would place consumers in a limbo of confusing price claims and misleading advertisements. They will be forced to pay additional charges and be unclear whether they have the legal right to object. We know by the time and energy Congress and others have put into the issue in the past that our worries are shared. It seems to us that whether or not the long term result of these hearings and the legislative process is to lift the ban, that more study must be given to resolving these worries and that to do so, by February 27 is a tall order. After all of our collective efforts it would be most unfortunate if the problems which we have taken pains to avoid are upon us simply due to inaction.

In summary, we think the existing law should be extended. However, we urge that, at the least, the temporary extension of the ban contained in H.R.4278, be adopted by the Senate.

Thank you for the opportunity to express our views.

Complete Prepared Statement of

Thomas N. Hammelman

MasterCard International Incorporated

Before the Subcommittee on Consumer Affairs

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February 7, 1984

Good day. My name is Thomas N. Hammelman. I am Executive Vice President of Norwest Bank Des Moines and a director of MasterCard International Incorporated, which I represent here today.

MasterCard International is a membership corporation of more than 12,000 U.S. financial institutions which issue and honor the familiar MasterCard credit card and MasterCard II debit card. Currently, approximately 52.2 million U.S. MasterCard cards are outstanding. On behalf of these institutions, I am pleased to comment on the cash discount/surcharge issue and, in particular, on whether the current Truth-in-Lending Act ban against the merchant practice of imposing a surcharge for credit card use should be allowed to expire or should be continued. We testified before both House and Senate Committees in the 96th and 97th Congresses on the issue, and so our feelings are well known. However, we again appreciate the opportunity to present our views,

especially in light of the approaching February 27 expiration date of the TILA surcharge ban.

At each of the hearings on this issue, several important facts and concepts have been debated. First, the question of whether there is a difference between a cash discount and a surcharge for credit card use has been asked and, if there is, what that difference constitutes has been discussed. Then, the query as to what expenses and benefits accrue with each of the payment mechanisms has been explored as has how the price of goods and services is affected by the acceptance of cards. Finally, witnesses have been asked what circumstances justify government regulation in this area. These matters were argued primarily because there was virtually no empirical evidence to support any of the facts and figures that existed on the topic. Beyond facts and figures, resolution of the issue needs to take into consideration certain elements of human behavior and other less tangible concepts that come into play when we review the cash discount/surcharge issues. This will be discussed further later on in our statement.

In 1981, when this issue was last considered by Congress, the FRB was directed to conduct a study to try to resolve these seemingly insoluable questions:

"the Board of Governors of the Federal Reserve System shall prepare a study, on the basis of a review and analysis of such data and studies as it finds appropriate...on the effect of charge card transactions upon card issuers, merchants, and consumers, including to the extent possible--

(1) the effects of charge card transactions on retail sales;

(2) the effect of charge card usage on consumers and on merchants, including the effects on merchant cost; and

(3) the effect of charge card usage on the pricing of goods and services, with a comparison of the costs resulting from payment by (A) currency and coin, (B) by personal check or similar instrument, (C) by in-house credit plans, and (D) by charge card."

The FRB conducted its study in 1983 and released its conclusions in July of last year. The FRB states that it found credit card transactions to cost retailers more than cash transactions and that such extra costs are not offset by incremental sales on the credit card.

Disappointingly, though, the Fed was unable to provide convincing data to support this statement and we find ourselves in the same position as before: with no conclusive data to help guide our decision.

Given the scarcity of reliable information available to us it becomes even more important to examine the reasons why a surcharge might be permitted. They are only three:

1) That surcharges represent a remedy to the alleged subsidization by cash customers of added costs incurred by the merchant in connection with credit card acceptance.

2) That surcharges could help contain inflation by discouraging card use.

3) That surcharges are merely a part of a merchant's pricing methodology and that pricing should be determined solely by free market forces.

We would like to discuss each of these reasons in turn, elaborating on whether or not these stated intentions are accomplished by permitting surcharges.

Behind the first reason, that cash customers subsidize credit card acceptance, is the working hypothesis that credit cards represent an overall negative cost to the retailer. The Fed in its study was to examine "the effects of charge card transactions on retail sales"[1] and formulate a conclusion based on its findings. The Fed reached the facile conclusion that "credit card transactions cost most retailers more than cash (or check) transactions, and that this cost is not offset by higher retail sales volume, but is reflected in the level of prices."[2] The Fed study goes into notable detail about the costs of various payment devices. Although we do not agree that credit cards cost more than cash or checks (and especially, not more than check verification programs), for the purpose of argument we will accept the Fed's conclusion on this point. However, the Fed study simply and wholly is without <u>any</u> information on which to justify its key conclusion that card acceptance does not add sales for the merchant. We do not believe one can effectively isolate the costs of credit card acceptance without understanding what benefits credit cards bring to retailers. This is key because if, in fact, card acceptance adds sales and profits, the cost associated with participation in a card program must be reduced accordingly and may yield a net positive position, contrary to the working

1 15 U.S.C. Section 1601, (1981)

2 <u>Credit Cards in the US Economy: Their Impact on Costs, Prices and Retail Sales</u>, (1983)

hypothesis. If the purpose of permitting surcharges is to impose on cardholders a retailer's net costs of card acceptance, then it is critical to know whether there are incremental sales or other quantifiable benefits which must be passed along to the cardholder. And, if there are none, then a surcharge merely represents an opportunity for more merchant profit, with no benefit to cash customers. Considering that the Fed has determined that card-related costs result in a less than one per cent (1%) mark-up in a retailer's price, card acceptance need then only attract one per cent of more sales volume (or such lesser figure) to result in a break-even situation as compared with other payment mechanisms.

Like the Fed, MasterCard does not possess any hard data showing whether or not additional transactions occur at a merchant because that merchant accepts a credit card. We have tried to obtain this information but time and again we are confronted with the difficulty of isolating card acceptance as one parameter from among many other complex factors which make up a purchase decision. However, we have conducted studies of cardholder behavior under certain circumstances and found that the average cash transaction is $35 and the average credit card transaction is $65. The difference in dollars spent is $30, a statistically significant figure. We will concede, though, that yet more

information must be collected to comprehend the impact of card acceptance on the number and dollars of a merchant's sales.

Even if this working premise was correct, the mere lifting of a surcharge ban would not accomplish the desired result of reducing the cash customer's financial burden. There is nothing implicit or explicit in lifting the ban (or, in letting the law expire) which would assure that the actual costs of card use previously paid by cash customers would be extracted from the price to cash customers. Said another way, if the ban is lifted tomorrow, one would expect cash customers to pay less for goods and services at a surcharging merchant than they did before a surcharge was imposed. However, we think this is naive. It is human nature to take the path of least resistance and rather than repricing all of a merchant's stock, it would be much easier, and therefore, more likely, for that merchant to simply charge each cardholder an additional fee at the time of the sale. Thus, we see human nature thwarting any hope that a card surcharge would lower prices for cash customers.

We submit that if the rationale behind permitting surcharges is based on a desire to undo the alleged "subsidy" paid by cash customers, Congress ought first to be certain there, in fact, is a subsidy and secondly, Congress should be sure that the lifting of the ban will, by itself, undo such a subsidy. As we

have said, we do not feel that a case for either prerequisite has yet been demonstrated.

The second argument implies that lifting the ban is needed to halt inflationary pressures. This argument was used in 1981, the last time the surcharge ban was in danger of expiring, at a time when it made more sense to do so. We had just emerged from one of the most difficult years we had had in a while. 1980 found us controlling credit and looking for ways to put a ceiling on runaway inflation. However, one need only look to the statistics of this past year to see that today's environment is quite different. Credit card use has been up this year while inflation closed out at 3.8% in 1983, the lowest rate since 1972. Nevertheless, credit cards represent only a very small percent of the consumer credit extended in the United States; and only 15% of all retail sales at card accepting merchants are made on credit cards. It seems to us an uphill argument to suggest that this small portion of the financial pie is materially directing the course of the economy and that curbing the use of credit cards would have such a strong impact.

We respectfully suggest that there must be more direct and effective measures available to Congress to control inflation than permitting card surcharges.

The third suggested reason for permitting surcharging is that it is consonant with a philosophy that all pricing must be deregulated. This notion has at its heart a very different motive than the first and second ideas discussed. In the first two, lifting the ban is intended to accomplish a specific remedial result and the propriety of such action can be measured by its effectiveness in accomplishing them. In the third point, the intent in removing the ban is not remedial per se but, rather, is philosophical. MasterCard supports the philosophy of price deregulation and, accordingly, has in the past supported the ability of a merchant to offer cash discounts. Providing cash discounts permits a merchant to encourage certain types of sales above others, in a true, free market spirit. And, the merchant is no longer limited by law to offering a five per cent discount, as he once was, but may choose to make available any amount of discount he wishes. In keeping in the spirit of free enterprise, we wish we could support the surcharging practice. But, we have several concerns about merchant surcharging which we must bring to Congress' attention.

Our first and foremost concern is with the welfare of our cardholders and the potential for confusion and abuse to which merchant surcharging may subject them. Merchants typically display the fact of their participation in a card plan conspicuously in their print ads, on radio, TV, on their

establishment doors and at their registers.

Consider the following very real scenarios which typify our concerns about the potential for abuse inherent in surcharging. Imagine that an individual learned that a merchant was running an excellent sale on a household item such as a microwave oven. This is a competitively priced, frequently advertised item for which the customer has been "shopping around" for some time. The customer read about the sale in an advertisement in his local newspaper which clearly stated that this merchant accepts major credit cards such as the MasterCard, Visa or American Express card. The advertisement makes no mention of any difference in price for cash purchases but simply makes known the merchant's willingness to accept various payment methods. The customer makes a special trip to the store, possibly incurring transportation and other expenses, planning to purchase the item with his credit card. He chooses the item, goes to the cash register to pay, only to discover then that the merchant is imposing a 5% surcharge for credit card use -- not a cash discount -- a significant addition to the regular price of a microwave oven. If the oven costs $600, a 5% surcharge would add $30 to the cost, an additional charge which might not make the purchase worthwhile or competitive. (If it were a 10% surcharge, the extra cost would be $60!)

That particular customer might not (and probably will not) be in a position to pay for the item by cash or check and, so, is forced to make a decision. He might decide to pay with the credit card and absorb the extra cost because he has no other method of payment available to him or because he is too embarrassed to admit at the point of sale that he prefers not to pay the surcharge. Or, he might be forced to forego the purchase altogether because the surcharge makes the item too expensive and, in fact, negates the sale price that was advertised in the newspaper.

Here is another scenario. A family is on vacation and decides to go out to dinner. The restaurant displays credit card logos on its windowpane or door. The family decides to pay for the meal by credit card and, again, when the bill is presented for payment, it learns for the first time that a surcharge of 5% will be imposed. In this situation, if cash is limited, the cardholder has no other choice but to pay by credit card. Thus, the surcharge is forced upon the cardholder. In this instance, the meal is already consumed and so payment must be rendered.

Both examples serve to explain how the lack of clear disclosure of the merchant's pricing policy results in discriminatory, unfair treatment to credit cardholders. The cardholder has been led to believe by advertisement or the display

of a logo that his credit card will be accepted ostensibly without conditions, but in fact, at the point of sale another story is told.

We are further concerned that a surcharge which is first made known and imposed at the time the sale is about to be consummated, subjects cardholders to discrimination on an individual basis. For example, a merchant may impose one surcharge amount on one cardholder and a higher surcharge amount on another cardholder. By merely lifting the ban, unscrupulous merchants may engage in discriminatory practices based solely on a cardholder's given characteristics. Such a practice is repugnant to us as a matter of moral compulsion and societal policy, and alone merits our deepest concern.[3]

Furthermore, as a representative of card issuers, we must voice our concern over the potential legal jeopardy in which card issuers, as creditors, may be placed by the unresolved question of whether any surcharge permitted by the lifting of the ban, or mere expiration of the present law, is a finance charge under state law. As you know, if a surcharge is a finance charge

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[3] It may also permit practices inconsistent with the Equal Credit Opportunity Act

or part of the total finance charge, it must be included in the creditor's calculation of interest paid by the consumer for the credit privilege. The state law in each and every fifty applicable jurisdictions, not to mention the District of Columbia and Puerto Rico, varies as to the constitution of a finance charge, and its component parts. What most states do have in common is that they establish a set, maximum rate of interest or finance charge which is strictly regulated by all. Inasmuch as the issuer, as a creditor, is liable for complying with these statutory finance charge limitations, he may be held accountable for these surcharges which as a creditor he neither knows about, controls or benefits by, but which has been imposed by the merchant (a creditor in a number of state definitions) and which the issuer has not factored into his finance charge. It seems hardly reasonable for Congress to put issuers into such legal straits by merely lifting the ban or letting it expire.

Another important reason why we cannot endorse merchant surcharging is that it serves to undermine the very purpose of the Truth-in-Lending Act: to inform consumers of the cost of credit and to enable them to comparatively shop for credit. A consumer makes an initial decision about which creditor and what terms of credit he wishes to accept based on an initial disclosure of such terms prepared by the creditor (the accuracy for which a

creditor is held strictly responsible and toward which he spends tremendous time and money). If the ban is lifted, or allowed to expire, one can assume that a variety of surcharges will take hold in the marketplace and will vary day-to-day, store-to-store, along with market forces and economic changes. How then, can a potential cardholder know which credit plan will be most cost efficient for him or her? How will he or she know of changes in a store's policy before money is tendered to make a purchase at an establishment? Inasmuch as the primary utility of a credit card is its retail acceptance to a consumer, the terms of card acceptance at a merchant are as important as a creditor's credit terms. Shopping comparisons between merchant locations for the best price for a particular good would entail greater sophistication and effort and ultimately lead to inordinate consumer confusion in the marketplace.

With the date closely approaching on which this law expires, we wish to voice our plea. If the expiration of the law is merely ignored and allowed to expire, it will surely affect us as the parent card company. But, its expiration will affect many others than us in a very immediate, direct and adverse fashion. It would, with the first surcharge, put our members in legal jeopardy under the state usury laws, as we mentioned. It would place consumers in a limbo of being victimized by confusing price claims and misleading advertisements. They will be forced to pay

additional charges and be unclear whether they have the legal right to object. We know by the time and energy Congress and others have put into the issue in the past that our worries are shared. It seems to us that whether or not the long term result of these hearings and the legislative process is to lift the ban, that more study must be given to resolving these worries. And, that completing the legislative process, drafting it, and putting it into law by February 27 is a tall order. After all of our collective efforts it would be a travesty if the problems which we have taken pains to avoid are upon us simply due to inaction.

In summary, we fail to see how permitting surcharging accomplishes any purpose other than creating the potential for consumer confusion and abuse. For this reason, we think the existing law permitting unlimited cash discounts and prohibiting card surcharges should be extended. However, we urge that, at the least, the temporary extension of the ban contained in H.R.4278, and passed by the House, be adopted by the Senate.

Thank you for the opportunity to express our views.

Senator GORTON. Thank you, Mr. Hammelman.
Mr. Menell.

STATEMENT OF HOWARD MENELL, DIRECTOR, GOVERNMENT AFFAIRS, AMERICAN EXPRESS CO.

Mr. MENELL. Thank you, Mr. Chairman.

Mr. Chairman, Senator Proxmire, I have been designated pinch-hitter this morning. My name is Howard Menell and I am director of Government affairs for the American Express Co.

[The complete statement follows:]

TESTIMONY OF HUGH H. SMITH

AMERICAN EXPRESS COMPANY

Mr. Chairman, my name is Hugh H. Smith. I am Senior Vice President-Government Affairs of the American Express Company. I appreciate the opportunity to testify this morning on the issues of cash discounts and credit card surcharges.

As you probably know, Mr. Chairman, American Express is the worldwide issuer of the American Express Card, a pay-as-you-go charge card. Because of our extensive worldwide involvement with this business for the past twenty-four years, we have a very direct interest in the issues of discounts and surcharges and, we believe, a good understanding of the economics of this business.

At the outset, Mr. Chairman, let me summarize our general position on the issues before the Subcommittee.

First, we oppose credit card surcharges and support a permanent prohibition on surcharges. This has been our position from the outset of this debate.

Second, we urge Congress to act immediately to delay the imminent expiration of the surcharge ban to permit orderly consideration of these important issues. The six-month postponement contained in H.R. 4278 is adequate assuming Congress makes a dedicated effort. A longer extension may be required, however, due to the crowded Congressional calendar in an election year.

Third, "deregulation" by "expiration" of the surcharge ban achieves no constructive purpose. To the contrary, it will create confusion, cause legal uncertainty and promote litigation. To facilitate the actual use of surcharges, these legal problems require identification and, in all likelihood, a coordinated state and federal legislative response.

Mr. Chairman, the balance of my remarks this morning will develop these major themes.

Beginning with the core issue of surcharges and the need for a permanent ban, let me articulate some basic facts about retailing.

1) Economies of scale apply to merchandising. That is, the more sales a merchant has, the lower his unit cost, and therefore, the greater his profit. Higher profits enhance a merchant's ability to compete and enable him to offer lower prices to the benefit of cash and credit customers equally.

2) Credit Increases Sales. Years ago, merchants found that sales increased dramatically if they offered credit. As a result, virtually every merchant had an in-house credit system. Further, although in-house credit systems delayed payment, merchants rarely charged for this service because the costs were low.

Again, because of the increased sales resulting from credit, lower prices could be offered to all customers, cash as well as credit.

3) Basic Economics Created the Card Industry. In recent years, the costs of in-house credit (i.e., the cost of money, credit investigations, processing, security, postage, bad debt losses, and collections) have become increasingly prohibitive for all but the largest merchants. Credit and charge card issuers responded by devising a more efficient and economical means to provide all the benefits of a credit system to the merchant. Moreover, because of their national scope, extensive advertising and good will, credit cards provided an added bonus to the merchant -- another source of increased sales. Because many traveling card holders live and shop outside the merchant's normal market area, they would not normally purchase from the merchant except for the fact that he accepts a nationally recognized card. Thus, the merchant benefits through (1) reduced costs, and (2) further increased sales, resulting in lower prices to all customers -- cash as well as credit.

4) Efficient Credit Providers Benefit all Consumers. The bottom line to all this is that it is essential for most merchants to offer credit. Far from getting a

free ride at the expense of cash customers, credit card customers help to keep a merchant's unit costs as low as possible and therefore contribute to lower prices for all customers. Arguably, without the existence of efficient credit providers and the increased sales they provide, cash customers would be paying an even higher price.

In 1981, this Committee recognized that "one of the basic issues of the surcharge debate is whether or not credit card operations result in higher overall prices and therefore whether cash customers subsidize credit card customers" and directed the Federal Reserve Board ("the Board") to study the issue and present its findings. That report, Credit Cards in the U.S. Economy: The Impact on Costs Prices and Retail Sales (July, 1983)("the Study"), concluded that "credit card transactions costs most retailers more than cash (or check) transactions".

The contributions of the Study to this debate are limited by several shortcomings. First, pursuant to its directive from Congress, the Board did not conduct an independent technical examination of the marketplace. Instead, its findings were based on surveys of consumers and retailers as well as reviews of literature. Some of the surveys cited in the Study directly contradict the Board's finding and prove the opposite--that credit is actually less expensive than cash. Second, the Board

did not take into account any advantages in sales volume realized by retailers resulting from the availability of credit as a competitive edge. The Board concluded that cards do not serve to increase sales on an economy-wide basis. Overall, the Study presented no reliable evidence to substantiate the conclusion that charge card transactions cost merchants more than cash sales.

The card industry is not alone in its criticism of the Study. Published reports indicate that members of the Board-appointed Consumer Advisory Council have also questioned the methodology, scope and conclusions of the Study. After reviewing the Study at the Board's request, the Council determined that insufficient data was available to draw definitive answers to the cost of cash versus credit debate.

Mr. Chairman, there is also a world of difference between a discount for cash and a surcharge for credit card use. Any similarity exists in theory only because the two are not functionally equivalent in the marketplace. For example, if a merchant offers a cash discount, the immediate and direct result is lower prices for the consuming public. On the other hand, in the case of a merchant imposing a surcharge, the credit card user is taxed without any corresponding savings to the cash customer. Thus, profits to the merchant increase with no discernible benefit in the form of lowered prices to the public.

Mr. Chairman, we believe there are significant problems attendant to a surcharge system. Potential discrimination is an example. Surcharges provide an easy technique for a merchant to penalize some customers to inflate profits, without passing the benefits on to other customers. This is possible because the typical credit card customer may not be in a bargaining position. Moreover, the merchant has little, if any, incentive to minimize the surcharge; it is all extra profit to him.

The most serious potential abuse is "bait and switch." The surcharge "bait and switch" would occur when a customer has selected merchandise only to find out at the cash register that there is an extra charge for paying by card. In addition to this deception, if the cardholder is switched to "cash", the merchant would be misappropriating the issuers goodwll.

Surcharges also present real dangers to card issuers. An efficient credit card system depends upon quality service to consumers and merchants and the goodwill and reputation of the issuer. Goodwill is generated and maintained through advertising, public relations, and marketing campaigns to the benefit of consumers and merchants as well as the issuer. But goodwill is a fragile commodity, indeed, and it can be destroyed quickly by the actions of a relatively small number of unscrupulous merchants. The negative impact on the card

issuer could be immediate. Eventually, the deleterious effect would interfere with the efficient functioning of the overall payments system.

For these reasons, we oppose credit card surcharges and wholeheartedly support a permanent extension of the surchange ban.

Turning to my second point, Mr. Chairman, we urge Congress to act immediately to prevent the surcharge ban from expiring later this month. This course of action will preserve the status quo while Congress decides whether and under what circumstances the surcharge ban should be permitted to expire.

The fundamental issues I just addressed should not be decided--and cannot be definitively resolved--by Congressional inaction. The automatic expiration of the ban scheduled for later this month can only result in confusion. Moreover, the lapse may be misinterpreted as relieving Congress of the obligation to decide these issues on a frontal basis.

Mr. Chairman, these are complex, even controversial, issues which warrant careful consideration and deliberate action. Congressional action should be preceded by a thorough review of all relevant information, including the Board's Study, and other information concerning the revolutionary changes occuring in payments systems. At the conclusion of

this process and as a matter of concious choice, Congress may then decide to permit the ban to expire, to extend it permanently, or take some other action.

In H.R. 4278, the House of Representatives has recognized the prudence of a six month postponement of the expiration date. This temporary extension is predicated upon the need for a more complete and orderly review of the entire subject of cash discounts and surcharges.

We fully agree with this predicate and support H.R. 4278; however, we question whether Congress can overcome the disruptions and distractions of this election year to sustain a serious review. The exact duration of any delay is a judgment for you to make, Mr. Chairman. I only point out that pragmatism may dictate scheduling the date of expiration until after the convening of the new Congress.

Mr. Chairman, without action by Congress, the surcharge ban will soon expire. The putative benefits of surcharges will remain conceptual, however, because the residual law will interfere with, and perhaps penalize, actual surcharging.

Congress has written the Truth in Lending Act purposefully to distinguish between surcharges and discounts.

As presently structured, the law encourages unlimited cash discounts accompanied by complete disclosure, prohibits surcharges and thus reinforces a two-tier pricing structure.

For example, under Federal law, a "discount" is exempt from the definition of finance charge. State laws to the contrary are preempted. This will not be the case for surcharges. As a result, a merchant imposing surcharges will incur a substantial risk of violating the Truth in Lending Act and state usury laws.

For card issuers, the problem is compounded. If a merchant adds a surcharge, an issuer who normally assesses a finance charge may violate--albeit inadvertently and involuntarily--both the disclosure provisions of Federal law and state rate laws.

For the consumer, expiration of the ban--without more--will frustrate the purpose of Truth in Lending--namely, to facilitate through full disclosure informed choices by consumers.

Mr. Chairman, to the extent surcharges are available after February 27, consumers will be confronted with undisclosed and unexpected charges. To permit and encourage surcharges and safeguard the interests of consumers, Congress will have to further amend Truth in Lending to address serious legal and disclosure problems under Federal and State laws.

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Allowing the ban to expire will achieve no constructive purpose and create considerable problems for consumers, merchants, and card issuers as well as Federal and State regulatory authorities. Nor will it constitute final Congressional action for the reasons just described.

Mr. Chairman, Congress has approved the present system of cash discounts and surcharge bans on three previous occasions. The laws have operated well and the overall system works efficiently. Until Congress decides and prepares to change this system, we believe the status quo should be maintained.

Senator GORTON. Thank you, Mr. Menell.
Mr. Russell.

STATEMENT OF CHARLES RUSSELL, PRESIDENT, VISA U.S.A. INC.

Mr. RUSSELL. Thank you, Mr. Chairman. I am Charles T. Russell, president of VISA U.S.A., on whose behalf I am appearing here today.

VISA U.S.A. is a membership corporation which administers the VISA card and travelers check programs throughout the United States and, Senator Proxmire, we do not have a political action committee.

Senator PROXMIRE. Good for you.

Mr. RUSSELL. Our membership includes more than 14,000 commercial banks, savings banks, savings and loan associations, and credit unions that participate in the VISA program. More than 100 million people worldwide carry VISA cards, which are honored at nearly 4 million merchant locations.

[The complete statement follows:]

TESTIMONY OF

VISA U.S.A., INC.

BEFORE THE

COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS

SUBCOMMITTEE ON CONSUMER AFFAIRS

UNITED STATES SENATE

HEARING ON

CREDIT CARD SURCHARGES

Mr. Chairman and Members of the Subcommittee, I am Charles T. Russell, President of Visa U.S.A., on whose behalf I am appearing here today.

Visa U.S.A. is a non-stock membership corporation incorporated under the laws of the State of Delaware, which administers the Visa Card and Travelers Cheque Programs throughout the United States. Our membership includes more than 14,000 commercial banks, savings banks, savings and loan associations, and credit unions that participate in the Visa program. More than 100 million people worldwide carry Visa cards, which are honored at nearly 4 million merchant locations.

On behalf of the extensive membership of Visa, I would like to thank you, Mr. Chairman, for giving us the opportunity to testify at these hearings on the need to extend the current prohibition on credit card surcharges as

provided under section 167 of the Truth-in-Lending Act. This provision will expire at the end of this month unless Congress acts to extend it.

Visa strongly supports a continued prohibition of credit card surcharges and urges the Congress to culminate this debate that has extended for nearly a decade and act to make this prohibition permanent. We believe that this would be in the best interest of consumers, financial institutions that participate in the Visa system and the system as a whole.

BACKGROUND

Congress first entered the debate on surcharges in 1976 at the request of the Federal Reserve Board in an effort to provide some guidance as to the distinction between surcharges and cash discounts. Clearly, Congress felt a need to distinguish between these separate and distinct terms and acted to amend the Truth-in-Lending Act at that time to prohibit the imposition of surcharges. This distinction was further delineated by defining the terms "discount" and "surcharge" as, respectively, a reduction from and an addition to the regular price. This prohibition, however, had a sunset date that provided for its expiration on February 27, 1979. In 1979 Congress re-entered the debate and elected to extend the prohibition to 1981, unchanged. Again, in 1981, responding to its own sunset, Congress passed the Cash Discount Act, which authorized merchants to

offer customers unlimited discounts for purchases made by cash, check or similar means and extended the prohibition of surcharges to February 27, 1984.

We now find ourselves once again facing the expiration of the surcharge prohibition and for the fourth time find that it incumbent upon us to reiterate our arguments surrounding the detrimental impact surcharges would have on consumers and this evolving payment system.

The present debate can be broken into two separate and distinct segments. The first relates to the long term, broad-based rationale for making permanent the surcharge ban, and the second relates to the disruption that is likely to occur in the marketplace if the surcharge prohibition is simply allowed to expire through Congressional inaction.

SURCHARGE PROHIBITION SHOULD BE MADE PERMANENT

We believe that no benefit would be gained by authorizing the imposition of credit card surcharges, while the potential detrimental impact could be significant.

The present cash discount provisions were enacted for the purpose of enabling merchants to impose upon consumers who use credit cards, rather than cash, the perceived additional expense incurred by the merchant in offering this service. We disagree with the underlying assumption that the cost to merchants of accepting bank cards is significantly higher than the costs associated with other methods

of payment and that these costs were being improperly passed on to the merchant's entire customer base.

Regardless of whether two-tier pricing is justified, if a merchant concludes that the cost of accepting credit cards is greater than its cost of accepting cash, a mechanism is already in place that allows that merchant to establish two-tier pricing. That mechanism is cash discounts.

Given that merchants currently have the ability to establish two-tier pricing, what incremental benefit would be derived from allowing two different methods of two-tier pricing? We believe that there would be none. However, the authorization of surcharges would result in a number of consumer problems.

The most obvious problem would be confusion in the marketplace if two different two-tier pricing schemes were being used by merchants. This situation would greatly increase the difficulty for consumers of comparison shopping. For example, assume one merchant advertises a particular product as costing $49.99, with a 4 percent discount provided for cash customers. Another merchant advertises the identical product for $48.50, with a 3 percent surcharge for credit card purchases. Many consumers would not know that they would be able to purchase the product at a lower price at the first merchant if they paid in cash; however, if they paid by credit card, the second merchant would offer the better deal. The difficulties of comparison shopping are greatly compounded if the advertisements do not even

disclose the fact that discounts are offered or surcharges are imposed.

Another concern we have regarding the expiration of the surcharge ban is the extent of the merchant's disclosure requirements. Simply being required to disclose the surcharge at the time of payment is inadequate. Merchants prominently display the fact that they accept credit cards to attract prospective customers. Disclosing the surcharge penalty to credit card users at the time of payment is tantamount to bait-and-switch tactics which are inherently deceptive.

Suppose a consumer is shopping in a store that imposes credit card surcharges. He does not notice the posted disclosure of this fact, and therefore is not aware of the store's practice. After having selected the goods to be purchased, he proceeds to the register to pay with his credit card. He then notices a sign posted at the register informing him of the surcharge being imposed. However, he does not have sufficient cash on hand to pay for his purchase by alternative means. Therefore, due to the surcharge, he ends up paying a higher price than he anticipated for the goods purchased.

Some consumers who do not become aware of the surcharge until the time of payment would have decided against making the purchase had they known of the surcharge before entering the store. However, they may be reluctant to cancel the transaction at the register due to the time they had already

expended selecting the items to be purchased, due to embarrassment, or a combination of both.

Compare this to a similar situation in a store that offers cash discounts, rather than imposes credit card surcharges. In this case, regardless of whether a customer is aware of the store policy, he may pay less than anticipated, if he is able to pay by cash, but he would never pay more than he anticipated. This is a key distinction between these two different forms of two-tier pricing.

In addition, we believe merchants will typically not lower their general price levels before imposing a credit card surcharge. Therefore, the surcharge would result in increased prices for credit card customers with no commensurate benefit to cash customers, and could, in fact, ultimately be inflationary.

Merchants have the ability to establish differential pricing today by use of cash discounts. Since surcharges are therefore not necessary to enable merchants to exercise this pricing flexibility, and are also detrimental to consumers, we urge Congress to make permanent the ban on credit card surcharges.

CONGRESS MUST ACT ON THIS ISSUE NOW

The imposition by merchants of surcharges on credit card users also presents the serious issue of possible violations of state usury laws and state mandated grace periods. These statutes in their many forms fix the maximum

rates at which finance charges may be collected from the consumer. The usury issue may arise in a number of different contexts. A purchaser might allege, for example, that a surcharge imposed by a seller should be aggregated with the finance charge imposed by the card issuer, which would produce a total finance charge in excess of that allowed by state usury laws.

The surcharge ban is due to expire in a matter of weeks. If Congress is not prepared at this point to make the surcharge ban permanent, it is essential that a temporary extension be enacted to allow further consideration of the issue, and to explore the ramifications of passively allowing the ban to expire.

Representative Frank Annunzio, Chairman of the House Banking Subcommittee on Consumer Affairs and Coinage, introduced a bill, H.R. 4278, to extend the February 27, 1984 sunset of the surcharge prohibition to July 31, 1984. This five month extension, passed overwhelmingly by the House on November 20, 1983, was intended as a simple housekeeping measure to ensure that Congress would have an opportunity to debate the issue fully during this session without subjecting merchants and card issuers to the substantial liability that could result if surcharges were authorized without the problems of state law being resolved.

As previously discussed, if the surcharge ban were simply allowed to expire, the imposition of surcharges by merchants may place merchants and card issuers alike at odds

with state usury laws. Section 171(c) of the Truth in Lending Act states that discounts "shall not be considered a finance charge or other charge for credit under the usury laws of any State or under the laws of any State related to disclosure..." Because a similar preemption is not provided for surcharges, the addition of a merchant-imposed surcharge to existing finance charges may result in a violation of a state's usury ceiling. Surcharges may also be construed to violate state "grace period" statutes which give the consumer a stated period in which to pay the credit card bill in full before a finance charge can be imposed.

This places card issuers in an untenable situation. Although issuers would have no knowledge or control of merchant surcharges, if such action were to result in litigation involving usury violations, it is likely that the card issuer would nevertheless be made a party to the suit.

We do not believe that the answer to these very real and far-reaching concerns lies in a simply preemption for reasons we have already discussed. We strongly recommend that the Senate act quickly to enact legislation to make permanent the surcharge prohibition, or failing that, move to enact legislation similar to H.R. 4278 in order to afford time for a more complete debate on the merits of the issue. Due to the short legislative session, however, we would further recommend that the provisions of H.R. 4278 be extended to eighteen rather than five months to avoid

conflicts with respect to the numerous recesses that will occur in this election year.

CONCLUSION

Over the past ten years, since this debate first began, there have been significant changes in the marketplace with respect to the use of both credit and debit cards as a means of consumer payment. Now, more than ever, these evolving payment mechanisms hold the potential of allowing consumers convenient access to their asset or credit accounts, anywhere in the world and at any time of the day. To allow the imposition of surcharges on consumer transactions without recognizing the long-range negative impact on this ever expanding payment mechanism would, in our view, be disastrous.

In summary, we believe that the authorization of surcharges is unwarranted since (1) merchants currently have the ability to offer a two-tier pricing structure, utilizing cash discounts; and (2) surcharges will inevitably lead to consumer confusion and abuse.

Visa appreciates this opportunity to present our views on this issue. I would be happy to answer any questions that you may have.

Thank you.

INTERNATIONAL OPERATIONS

Senator GORTON. Mr. Menell, you reminded me of something at the beginning of your testimony which is probably true of the two others as well, and that is that your operations are international.

Are there any nations in which American Express operates which authorize surcharges on the parts of the merchants accepting American Express cards?

Mr. MENELL. Subject to a more careful review of the many nations involved and their laws, the answer right now would be no, I know of none.

Senator GORTON. Are there any which authorize cash discounts?

Mr. MENELL. Generally, I don't know of any that specifically authorize cash discounts and I know of none that specifically prohibits them. I do not believe it is common.

Senator GORTON. Where you can in dealing with foreign merchants in foreign countries, do you prohibit them?

Mr. MENELL. No.

POSITION ON CASH DISCOUNTS

Senator GORTON. This question is for all of you. What is your position on cash discounts and is that the same position which your organization took at the time at which they were an issue? Would you like to ban cash discounts?

Mr. MENELL. No; as I recall, in 1981, we favored the removal of the limitation of 5 percent on cash discounts and we believed then and now that the availability of cash discounts provides a well understood two-tier pricing system to the benefit of consumers, merchants, and everybody else in the marketplace.

Senator GORTON. Would each of you, the others, answer the question the same way?

Mr. RUSSELL. At present we support the ability of merchants to offer cash discounts. However, I don't know what our original position was.

Senator GORTON. Mr. Hammelman.

Mr. HAMMELMAN. We support cash discounts. I'm not sure if our position has been that way all along or not.

Senator GORTON. Let me address my next question to you. You gave a very graphic example of a purchaser who looked through advertisements and found the appliance at $600 at best price with an indication that credit cards were accepted, only to get to the store and find out that there was a 5-percent surcharge. It's quite obvious that that could make what was otherwise the best purchase into something which was not the best purchase. But wouldn't that problem be entirely cured by a requirement of disclosure, that is, if your advertisements say that you accept credit cards you indicate there's going to be a surcharge on them; and would the same thing be true in connection with any other advertisements for credit?

Mr. HAMMELMAN. That question sort of goes to the point about what is the regular price, and one could say that the regular price is the advertised price, and if you disclose that there is a markup for credit card transactions, then you would be disclosing the regular credit card price.

I guess I would say, Mr. Chairman, that the problem isn't simply with disclosure. There also needs to be enforcement, and protection, and also the need to distribute an awareness of the general operating body of law to, in this case I believe, nearly all the consumers in the United States.

So I'm not sure—I guess it's a theoretical point. Disclosure in advertising, if that kind of requirement is written into the law, could perhaps alert consumers. Actual enforcement and what consumers do if in fact they made a rather large commitment, let's say driven 100 miles to buy something and find out it's not as advertised or unadvertised, I think are immense problems.

Moreover, I guess I would say that, again, the discount method seems to cure all these problems.

Senator GORTON. Another question. The U.S.A. Today article to which I referred in questioning Mrs. Teeters included the information that J. C. Penney collected $528 million in finance charges in 1982 but had expenses of $538 million and thus lost money. Several other prominent retailers also fell into the same category. The National Retail Merchants Association estimated that: "The typical department store losses amount to 3.1 percent of total credit sales." And the Federal Reserve Board study indicated that 88 percent of the merchants surveyed thought that credit cards were more costly than cash. At least one of you—and I'm sorry I can't remember now—indicated that credit might actually cost less than cash.

Why is your perception of that proposition so vastly different from the majority of retailers?

Mr. MENELL. That's not a perception. Mr. Chairman, that is based upon findings of studies done several years ago which were actually cited in the Federal Reserve Board's study. None of these studies are dispositive of this issue, however.

I have already mentioned the limits in the Fed study. It was not an original piece of work. The particular study which I cite factored in all of the costs of handling cash and handling credit. In the case of cash, it's security, personnel, bonding, and accounting. In the case of credit card, I believe it is the card issuers discount and delayed payment. No bookkeeping, no security, and no bad debts. At most this study actually proves exactly the opposite of what the Fed study concludes.

The Board's conclusion that credit card transactions are more expensive than cash transactions is contradicted by two of the studies cited by the study:

1. "Cost of Cash; a Strategic Analysis," Payment Systems, Inc. (Atlanta, 1981); and

2. "Transaction Costs to Retailers of Different Methods of Payment. Results of a Pilot Study" (report prepared at the City University, London, 1982).

This general subject and these studies are discussed in the appendix to the statement of the American Bankers Association entitled, "Summary and Analysis of Federal Reserve Board Study on Credit Card Surcharges" (at pp. 2-4).

Senator GORTON. Mr. Menell, let's assume the correctness of that proposition. Would that not mean that at least after a very short introductory time, should we allow surcharges, that they either wouldn't catch on or they would be abandoned in a free market? If

in fact there is no extra cost in using credit cards, there won't be any surcharges even if merchants were free to do so, would there?

Mr. MENELL. I'm not entirely sure. We have surcharging now, as a matter of fact, despite the present Federal law. We often don't know what the merchant does—when or how much he may surcharge. It is reported often by an irate consumer customer, one of our cardholders. We immediately turn the reported violation of law over to the Better Business Bureau and to law enforcement agencies. In many of those cases the surcharging is excessive and usurious. If Federal law is amended to permit surcharging, some unscrupulous merchants would continue with their new liberties to impose unfair charges on their customers.

Senator GORTON. Even though they weren't cost-based?

Mr. MENELL. Well, there simply is no incentive to a merchant if a surcharge is permitted, to minimize the amount of the surcharge and the additional cost to the consumer because the surcharge is all profit to the merchant. The incentive is to the contrary, to increase the surcharge regardless of actual costs.

Senator GORTON. Thank you.

Senator PROXMIRE. Mr. Menell, you said that you know of no nations that authorize surcharges on credit cards; is that right; with your broad international use?

Mr. MENELL. I believe that was the question. My answer was subject to a review of all the many nations.

Senator PROXMIRE. Well, subject to—that was a very clever and thoughtful reservation. Would you give me a list of any nations that ban surcharges as we do?

Mr. MENELL. Yes.

Senator PROXMIRE. Does England, does Canada, does Mexico? What are they?

Mr. MENELL. I'll undertake to provide you with a list.

[The following list was subsequently submitted for the record:]

SUMMARY

In general, surcharges for the use of credit cards are virtually unknown in most countries. Differential pricing (surcharges for cards or discounts for cash) is not an accepted trading practice. Only a few countries have laws which are specifically drafted to apply to such pricing policies. In many countries, existing laws on pricing and price display effectively eliminate surcharges.

BELGIUM AND LUXEMBOURG

In current practice, surcharges are unlikely to arise in either country. If a surcharge were to be levied in Belgium on a payment by credit card, the ensuing higher price would have to comply with the law on prior declarations of price increases.

DENMARK

For those payments which are transacted by credit card, there are generally no surcharges. Currency laws in Denmark impose restrictions on widespread use of credit cards by Danes.

GERMANY

The current laws on pricing and price display in Germany require that the price displayed be the final price normally charged by the trader for that good/service. This effectively eliminates surcharges. Other legislation restricts discounts for cash to only 3%. The terms of contract between traders and some card issuers prevent differential pricing.

FRANCE

Current pricing laws require that the total price must be clearly displayed for the customer to see before he makes his purchase. Surcharges on payments made by credit card are virtually unknown, and would in some cases provide a breach of contract with the card issuer.

IRELAND

Surcharges for the use of credit cards are virtually unknown.

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ITALY

In current practice, surcharges are not levied on credit card transactions and insofar as differentials exist, they take the form of cash discounts.

NETHERLANDS

Dutch law closely circumscribes the provision of cash discounts; in current practice these are rarely offered. For example, there is the possibility of obtaining a cash discount in connection with gifts, such as those offered by petrol stations. If the customer does not wish to accept the gift, the trader is obliged to provide a cash discount instead. Surcharges are virtually unknown.

UNITED KINGDOM

The legal status of differential pricing in the United Kingdom has been under close scrutiny since the Director General of Fair Trading referred the subject of credit card franchise services to the Monopolies & Mergers Commission in 1977. The UK Government has not decided whether to act upon a suggestion that a "no-discrimination clause" in the agreement between traders and some credit card issuers should be abandoned. In the resulting uncertainty, some traders are adding a surcharge for payment by credit cards. This has caused a considerable number of consumer complaints, particularly where no adequate notice of such surcharges has been given. The current situation has also cast doubt on the efficacy of existing price display regulations.

Senator PROXMIRE. But you know of none? You don't know of any other nation in the world that does what we do which is to ban surcharges on credit cards by the merchants?

Mr. MENELL. I don't.

Senator PROXMIRE. None of you? Well, that's it. I mean, after all, it seems to me that the international case on the basis of example is pretty weak. I mean, you're the expert, American Express is. There's no firm, as the chairman has pointed out, that deals more widely internationally with credit than American Express does.

CRITICISM OF FEDERAL RESERVE BOARD STUDY

Now in your statement on page 5, you say, "The card industry is not alone in its criticism of the study," referring to the Federal Reserve Board study. "Published reports indicate that members of the Board-appointed Consumer Advisory Council have also questioned the methodology, scope, and conclusions of the study. After reviewing the study at the Board's request, the Council determined that insufficient data was available to draw definitive answers to the cost of cash versus credit debate."

Now I have the minutes here or excerpts of the minutes of the Federal Reserve Board. Here's what they said:

> Although any such study has limitations because of incomplete data and therefore tends to be somewhat subjective, the committee felt that the study is the best evidence to date on the complex retail credit card issue.

It's quite different from what you told us in your statement.

Mr. MENELL. Can you give me the date of that document?

Senator PROXMIRE. Excerpt from the minutes of the October 26–27, 1983, meeting.

Mr. MENELL. That document, I believe, has been superseded by——

Senator PROXMIRE. This is from the Advisory Council.

Mr. MENELL. Yes, sir; I believe it has been superseded by other communications. Moreover, I believe the Council is scheduled to meet again on the question early next month.

Senator PROXMIRE. Well, if it's superseded, do you have the documentation to show that it's superseded to contradict this?

Mr. MENELL. I will provide it. Mr. Smith had it in his possession.

Senator PROXMIRE. Can you tell me what date that occurred?

Mr. MENELL. Offhand, I cannot. I will provide it.

[The following information was subsequently submitted for the record:]

To substantiate the points made in my prepared statement about the Consumer Advisory Council's criticism of the Fed Study, it is necessary to review the complete version of the minutes of the October 27, 1983 meeting rather than excerpt Senator Proxmire quoted.

The quoted statement was made by Council member Harry Jackson, Chairman of the Economic Impact Analysis Committee of the Consumer Advisory Council. This Committee had reviewed the Board's Study and was presenting its comments at that meeting. The remarks quoted by Senator Proxmire thus represent the views of the Committee. The statement does not reflect the views or any consensus of the full Council itself.

As indicated in the very next paragraph of the more complete version of the minutes (pg. 15), there were:

> "several legislative alternatives that the committee felt may evolve from the study. He pointed out that all of the committee

> members do not necessarily agree with all of the alternatives. Furthermore, the committee as a group does not endorse any of the following alternatives:
>
> 1. Extend the current law which allows unlimited cash discounts and bans a surcharge on credit.
>
> 2. Require a discount for cash.
>
> 3. Allow or require a surcharge for credit.
>
> 4. Preempt state finance charge usury laws.
>
> 5. Allow or require a user fee for a credit account.
>
> 6. Allow or require finance charges to be assessed from the date of purchase and eliminate forgiveness on any acccount paid in full each month."

The following three and a half pages of the minutes summarize the Council's discussion following Mr. Jackson's report. Various individual members of the Council spoke both for and against the concept of surcharging and expressed their concerns about the issue.

The discussion was concluded, as noted on page 19 of the minutes, with a statement from Mr. Tim Marrinan, as follows:

> "Mr. Marrinan stated that credit cards are only one aspect of the new payments mechanism system that had been developing for several years. He said that to discuss this topic thoroughly, the Council must look at the different subsidies involved in all these payment systems. He stated that this discussion may be premature or taken out of context if there is a recommendation now without that additional perspective."

In sum, the full Consumer Advisory Council neither endorsed the Board's study nor made any decision or recommendation regarding what position the Fed should take on the issue. These points are made on page 5 of my prepared statement and are not contradicted by the complete version of the minutes.

Because I did not have the actual documents in hand and I was not offered an opportunity to examine the source of the quotation, I indicated that the statement in the prepared testimony was based on documents which superceded the minutes of the October 26-27 meeting. As indicated above, the correct source is the minutes. Confusion over the dates occurred because the minutes of the October 26-27, 1983 meeting were not available and distributed until late January, 1984.

This delay and the confusion it caused aside, a full text of the minutes is enclosed. Also attached is a published report suggesting that members of the Board-appointed Consumer Advisory Council have questioned the methodology, scope and conclusions of the Study.

MINUTES

Board of Governors of the Federal Reserve System

Consumer Advisory Council

October 26-27, 1983

These minutes will be submitted to the Council for its formal approval at the next meeting. Any changes that Council members may make then will be noted in the minutes of the meeting.

The minutes represent a summary of the discussions that occurred. The entire proceedings are tape recorded; tapes may be purchased for $5.00 each through the Freedom of Information Office, Board of Governors of the Federal Reserve System, Washington, D.C. 20551. In addition, written transcripts of selected portions of the meeting may be available from time to time as noted in the minutes.

ALL PORTIONS OF COUNCIL MEETINGS ARE OPEN TO THE PUBLIC

(Depending on the length of Council discussion on a given topic, the scheduled times may vary slightly.)

CONSUMER ADVISORY COUNCIL MEETING

OCTOBER 26-27, 1983

AGENDA

Wednesday, October 26

1:00 p.m. Meeting convenes. Announcements.

1:05 p.m. Strengthening the Consumer Credit Fraud Statutes--Discussion of (1) the magnitude of consumer credit card fraud in the United States today, and (2) proposed legislation to expand existing law so that more cases of card fraud become federal offenses.

2:15 p.m. Bankruptcy Reform--Discussion of (1) whether individuals should be denied relief under Chapter 7 of the Bankruptcy code if it is shown that they have the potential to repay their debt out of future earnings, and (2) a recent U.S. General Accounting Office study that takes a before-and-after look at the Bankruptcy Reform Act of 1978.

3:15 p.m. Recess.

3:30 p.m. Evaluation of the Consumer Advisory Council--Remarks by members whose terms expire at year-end; discussion of (1) ways in which the Council's usefulness and effectiveness could be increased, (2) whether the scope of the Council should be expanded to include providing advice and counsel to all the federal financial regulators and supervisors, and (3) ways to utilize the expertise of former Council members.

5:00 p.m. Recess until Thursday morning.

Thursday, October 27

9:00 a.m.	Review of the Board's Credit Card Study--Discussion of the findings of the Board's credit card study of the economic effects of charge card usage on consumers, merchants, and card issuers; the study was mandated by the Cash Discount Act of 1981.
10:30 a.m.	Recess.
10:45 a.m.	Implications of Recent Deregulatory Initiatives in the Area of Consumer Financial Protection--Discussion of (1) possible implications of the Administration's bank holding company deregulation proposal on consumer financial protection legislation and regulation, and (2) ways to help consumers cope with the realities of a deregulated marketplace.
12:00 p.m.	Regulatory Update-Staff report on recent Board regulatory actions in the area of consumer financial services.
12:30 p.m.	Recess.
2:00 p.m.	Open Session-time available for introduction by Council members of new subjects or matters previously considered.
3:00 p.m.	Adjournment.

A meeting between available members of the Board of Governors of the Federal Reserve System and its Consumer Advisory Council was held in Terrace Room E of the Federal Reserve's Martin Building in Washington, D. C., on October 26-27, 1983.

PRESENT: C.A.C. MEMBERS

Susan Pierson De Witt (C.A.C. Chairman)
U.S. Trustee for the Northern
District of Illinois, Chicago, Illinois
William J. O'Connor, Jr., (C.A.C. Vice Chairman)
Partner, Phillips, Lytle, Hitchcock, Blaine &
Huber, Buffalo, New York
Arthur F. Bouton, President, American Association
of Retired Persons, Little Rock, Arkansas
Gerald R. Christensen, President and Chairman of
the Board, First Federal Savings and Loan
Association, Salt Lake City, Utah
Thomas L. Clark, Jr., Deputy Superintendent of Banks,
New York State Banking Department, New York, New York
Jean A. Crockett, Professor of Finance,
Wharton Graduate School, University of Pennsylvania,
Philadelphia, Pennsylvania
Joseph N. Cugini, President & General Manager,
Westerly Community Credit Union, Westerly,
Rhode Island
Allen J. Fishbein, Director, Neighborhood
Revitalization Project, Center for Community
Change, Washington, D.C.
Luther H. Gatling, President, Budget & Credit
Counseling Service, New York, New York
Richard F. Halliburton, Deputy Director, Legal Aid
of Western Missouri, Kansas City, Missouri
Charles C. Holt, Professor of Management,
University of Texas at Austin, Austin, Texas
George S. Irvin, President, George Irvin Chevrolet,
Denver, Colorado
Harry N. Jackson, Vice President, Credit, Dayton
Hudson Corporation, Minneapolis, Minnesota
Timothy D. Marrinan, Assistant Vice President and
Legal Counsel, First Bank System, Inc.,
Minneapolis, Minnesota

C.A.C. MEMBERS (continued)

Stanley L. Mularz, President, Trans Union Credit Information Company, Chicago, Illinois
Willard P. Ogburn, Deputy Director, National Consumer Law Center, Boston, Massachusetts
Elva Quijano, Vice President and Executive Professional Officer, Republic Bank of San Antonio, San Antonio, Texas
Janet J. Rathe, Executive Committee Member, Oregon Consumer League, Portland, Oregon
Janet M. Scacciotti, President and Chief Executive Officer, Guild Loan and Investment Company, Providence, Rhode Island
Glenda G. Sloane, Director, Housing and Community Development, Center for National Policy Review, Catholic University School of Law, Washington, D.C.
Henry J. Sommer, Supervising Attorney, Community Legal Services, Inc., Philadelphia, Pennsylvania
Nancy Z. Spillman, Chair, Business Administration Dept. and Professor of Economics, Los Angeles Trade Technical College, Los Angeles, California
Winnie F. Taylor, Associate Professor of Law, Holland Law Center, University of Florida, Gainesville, Florida
Michael M. Van Buskirk, Community Development Officer, Banc One Corporation, Columbus, Ohio
Clinton Warne, President, Consumers League of Ohio, Cleveland, Ohio
Frederick T. Weimer, General Assistant to the Vice President and General Credit Manager, Sears, Roebuck and Co., Chicago, Illinois

Note: The following Council members were unable to attend:

James G. Boyle, Public Utility Counsel, State of Texas, Austin, Texas
Meredith Fernstrom, Senior Vice President, Office of Public Responsibility, American Express Company, New York, New York
E. C. A. Forsberg, Sr., President and Chief Executive Officer, Gulf Finance Corporation, Atlanta, Georgia
Kenneth V. Larkin, Executive Vice President, Bank of America, N.T. and S.A., San Francisco, California

REPRESENTATIVES OF THE BOARD OF GOVERNORS

Chairman Volcker
Governor Wallich
Governor Partee
Governor Teeters
Governor Rice

Staff of the Division of Consumer and Community Affairs

Mr. Garwood, Director
Mr. Kluckman, Associate Director
Ms. Smith, Assistant Director
Mr. Wood, Senior Attorney
Ms. Bray, Staff Assistant and CAC Secretary
Ms. Calhoun, CAC Administrative Specialist

Other staff

Mr. Luckett, Economist, Division of Research and Statistics
Ms. Baldwin, Technical Writer, Office of the Secretary of the Board

Wednesday, October 26, 1983

After the call to order, the minutes of the July 1983 meeting were approved.

I. Strengthening the Consumer Credit Fraud Statutes

A. Staff presentation

Mr. Wood discussed briefly the recent increase of credit card fraud. He said that the incidents of fraud involving VISA and MasterCard credit cards have doubled over the last few years. (Members had received a copy of Governor Teeters' testimony in July 1983 before the House Banking Committee on a fraud bill, H.R. 3622, commonly called the Annunzio bill). Mr. Wood said that a new element in card fraud is counterfeiting, which can cause a much greater loss to an individual than that resulting from a lost or stolen card. This bill would deal with fraud through placing restrictions on transfers of account numbers and broadening coverage of fraudulent possession and usage. Mr. Wood stated that bills other than H.R. 3622 had been introduced in the Congress that contain various other provisions, such as amendments to the Electronic Fund Transfer Act and to the U.S. criminal code.

B. Council discussion

Council members and the staff then discussed questions concerning credit card fraud, including whether the problems could be better handled on the state level and whether consumers would incur additional liability as a result of fraudulent use of their credit card numbers.

Mr. Weimer supported the adoption of a law that would help reduce fraud, but he asserted that H.R. 3622 contains inadequacies that would overcome any good the bill might accomplish. He stated that section 2 of the bill, which restricts the transfer of account numbers to internal use, would inhibit an organization's quickly and accurately crediting a consumer's account, would inhibit easy access to a consumer's account in promotional activities through use of machine readable formats and would make correct billings of accounts more difficult. In addition, this provision would restrict the use of card numbers between credit bureaus and their clients. He felt that one of the other bills before the Congress would cure the ills without hurting the industry and consumers alike, and he urged the Board to support one of the other bills.

Mr. O'Connor stated that H.R. 3622 is an amendment to the truth in lending law that addresses only the fraud problem. He stated that some of the other bills would address forgery, fraud, and counterfeiting, but would be a slower, more long-term solution to the problems than H.R. 3622 would be. Mr. O'Connor disassociated some creditors from Mr. Weimer's remarks. He stated that bank cards are used in a wide variety of establishments over which the banks have no control; whereas, retail cards have a more restricted use. He stated that the banks are more sensitive to the distribution of account numbers than retailers are; therefore, banks have been somewhat more supportive of H.R. 3622. Furthermore, he pointed out that the fraud that has been occurring is account number fraud, and he hoped that this problem would be addressed directly.

Mr. Mularz focused, like Mr. Weimer, on section 2 of the bill. and contended that the Annunzio bill would create problems for the credit granting and credit reporting industries by delaying the approval process and increasing the cost of credit through changes in computer systems and operational procedures. Contrary to Mr. O'Connor's statement, Mr. Mularz said that although many banks support the Annunzio bill through the American Bankers Association, his organization had found through survey research that many banks do not support it individually. He stated that rather than solving fraud problems, the bill seems to be attacking the three areas where the creditors need the account numbers most--processing new applications and additional purchases and remedying collection problems.

Other Council members commented on the interest rate charges for bank cards compared with retail cards, the relationship between bank card rates and the state usury ceilings, use of internal identifiers other than account numbers, and the extent of consumer negligence, if any, attributable to card fraud.

II. Bankruptcy Reform

A. Council presentation

Members had received a copy of the study conducted by the General Accounting Office that takes a before-and-after look at the Bankruptcy Reform Act of 1978.

Mr. Sommer gave a brief history of the research, hearings, and other factors that were considered before the Bankruptcy Reform Act was passed in 1978. In passing the act, Congress tried to remedy the problems

that had been encountered under the old bankruptcy law, primarily concerning creditor abuses in coercing consumers to reaffirm their debts through making claims of false financial statements, pressuring the cosigner, and holding security interest filings. Congress also set up a system of bankruptcy courts and judges.

After the new law was enacted, the large increase in the number of bankruptcy filings prompted a study to be commissioned by a coalition of creditors. According to that study, almost half of the people who file for bankruptcy can pay off some of their debts. The creditors' solution to increased bankruptcy filings is to institute a future income test for chapter 7 bankruptcy. If the judge determines that the borrower can pay off some debts in the future, the borrower cannot file a straight bankruptcy. Based on the findings of this study, this coalition of creditors has sponsored a bill, the key provision of which would be that the future income of the individual would be considered.

Mr. Sommer pointed out, however, that the creditors' study and their proposed solutions have been widely criticized. The study was done by a group that has long been closely identified with creditor interests, and that group has refused to allow its raw data to be verified. Moreover, the study's conclusion that a large percentage of debtors could pay was based upon assumptions that these debtors would be reduced to a poverty-level standard of living, would have no additional children, health problems or other expenses, and would have a steady or increasing

income. The study further hypothesized that there would be a five year period extending the dates that the debts were originally due. Mr. Sommer said that even using all of these unrealistic assumptions, the study found that only about a quarter of bankruptcy debtors could pay their debts in full.

In addition, Mr. Sommer stated that the creditors' proposals for forced five year bankruptcy payment plans out of future income have also met widespread opposition. Bankruptcy judges have testified that they are likely to be unworkable in practice, difficult to administer and arbitrary in result, as different families with widely varying fixed expenses are compared to each other. Others have noted that the costs of the proposals, which would create a collection service for creditors, could well be greater than the amounts collected.

Mr. Sommer stated that the General Accounting Office conducted a study also and found that factors such as unemployment, interest rates, and inflation are more important to the rise in bankruptcy filings than the amount of disposable income is. Other studies have found that the type of person filing for bankruptcy has not changed significantly under the new Bankruptcy Code. Opposition to the creditor proposal is widespread, he said, because most groups believe that the percentage of abuse is very small. Mr. Sommer stated that the current laws need changes, but he stated that the current laws already contain remedies creditors can use.

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B. Council discussion

Council members then discussed the extent to which bankrupt consumers are extended credit. Some members pointed out that the determination to extend additional credit is decided on a case-by-case basis, with each creditor having its own policy. Several members offered anecdotes of their experiences. Council members then discussed the impact of advertising on the number of bankruptcy filings. Some members felt that advertising contributed, along with a number of other factors, to the increase in bankruptcies. Mr. Sommer said that many people who are not lawyers provide bankruptcy services that prove to be harmful to consumers. He said that some of these bankruptcy filings never are processed, yet they are included in the statistics of numbers of filings.

The members discussed whether there has been a change in creditors' granting credit to businesses that have filed for reorganizations under bankruptcy, since the bankruptcy court system will go out of existence at the end of March 1984 (unless Congress enacts an extension). Mr. Van Buskirk stated that he does not think there has been any change. Members raised a number of questions for discussion, such as whether a distinction is drawn, for credit granting purposes, between a chapter 13 and chapter 7 bankruptcy filing, whether the ability of other consumers to obtain credit has been affected by the number of bankruptcy filings, and whether an institution's size affects the extension of credit to a bankrupt.

III. Evaluation of the Consumer Advisory Council

During this portion of the meeting, the Council heard remarks from the thirteen members whose terms expire at the end of 1983. Members discussed methods to improve the Council's usefulness and effectiveness and to use the expertise of former Council members. There was a consensus among the departing members that their terms had been informative and challenging. They were especially appreciative of the active participation of the Board members and of the excellent support provided by the Board's staff. Moreover, they said that Council members represent a good balance of financial industry and consumer interests. The Council members offered the following suggestions for improving the usefulness and effectiveness of the Council:

1. Have representatives from other financial regulatory agencies present when the Council's discussion is related to their operations.

2. Distill the information that is sent to members to include only information pertinent to the proposal for discussion.

3. Develop ways to trigger more active participation by all members.

4. Develop a directory of resources for obtaining data to be used by future study groups; include the names and addresses of former members.

5. Make greater use of study groups and committees to research issues and to help refine discussions of issues.

6. Hold four meetings per year, rather than three, to allow more thorough discussions of issues and to allow more issues to be considered.

7. Maintain a mailing list of former members so that they may receive information about the Council's discussions.

8. Bring the products of committee work back to the Council for public discussion.

9. Appoint an executive committee that can act on business between Council meetings.

Governor Teeters then thanked the departing members for their work with the Council.

B. Council presentation

Mr. Marrinan talked about several ideas that he felt would improve the Council's effectiveness and would allow members to provide more substantive advice to the Board. First, he felt that the Council should have four, rather than three, meetings per year. More meetings would permit the Council to devote more time to on-going issues like deregulation. Second, he believed that the Council should develop an annual work planning process to allow it to achieve its maximum potential. He would like to see the Council take a more active role in anticipating issues and shaping resolutions. Mr. Marrinan moved that the Council form a policy and planning committee to address the on-going role of the CAC and to consider the adoption of appropriate policy and procedural guidelines by which to implement that role.

C. Council discussion

The Council then discussed the ideas that Mr. Marrinan suggested. Ms. Taylor and several others believed that the committees should meet more frequently between Council meetings to allow the committees to bring realistic and well-planned proposals for the full Council's consideration. Several members agreed that work in small groups would help the Council to achieve its goals and that long-term planning

would help to ensure continuity in the discussion of issues. At the same time, members believed that it is important for the Council to discuss items that the Board considers important since the Council's purpose is to provide advice to the Board. Governor Teeters encouraged the Council to continually think of ways to improve its usefulness and effectiveness; a policy and planning committee would help the Council to be more organized and to consider issues that require more time and analysis. She asked the Council to consider the Board's budgetary constraints when planning the size and frequency of meetings for its committees.

At the conclusion of the discussion, the Council approved Mr. Marrinan's motion to establish a policy and planning committee.

D. Council presentation

Mr. Clark then discussed his thoughts for expanding the Council. He described an interagency subcommittee of the New York State Banking Department that meets regularly with state and federal banking authorities to discuss issues of mutual concern. A consumer advisory council, he said, is needed for all of the financial regulatory agencies. He observed that there seems to be a lessening of consumer concerns by the other federal financial regulatory agencies on issues concerning community reinvestment and deregulation. He said that the other agencies should be encouraged through the Vice President's Task Group on Regulation of Financial Services (commonly called the Bush Commission) to form consumer advisory councils.

E. Council discussion

Governor Teeters stated that the best way to accomplish the goal Mr. Clark mentioned is through legislative channels. That way, the other agencies would be mandated to take certain actions.

Mr. Holt suggested that a resolution be sent to the appropriate congressional committee expressing the Council's views on expanding the advisory council concept to the other agencies. Several other members agreed that a consumer advisory council would be useful to the other regulatory agencies. After members' discussion of the best method to convey to legislators the Council's views on expanding the consumer advisory function, Mr. Clark moved that the Council urge the Bush Commission to consider in its final deliberations a consumer advisory council as relates to all the financial regulatory agencies. The motion was seconded.

Mr. O'Connor amended that motion to recommend to the Bush Commission that a consumer advisory function similar to the Board's Council be established, for the other agencies that have enforcement powers under the Consumer Credit Protection Act, to undertake activities similar to those which this Council has undertaken. The motion was seconded.

Mr. Christensen stated that he felt the same group should be the advisory council to all the agencies.

Mr. Marrinan stated that he informally could give the Council's recommendation to the Bush Commission's general counsel. Mr. Clark believed that the recommendation should come from the Council's chairman and that any informal contacts could be a supplement. Mr. Sommer stated that not much would be accomplished by having the Council send a letter to the Bush Commission or to a congressional committee. He stated that the informal first step that Mr. Marrinan suggested is the best thing the Council could do now.

The Council then approved the amended motion.

The discussion was then opened for other ideas for improving the Council's effectiveness. Ms. Taylor suggested that the minutes of Council meetings be sent to former Council members to keep them involved with the Council's activities. Mr. Sommer felt an executive committee as well as the policy and planning committee should be established. Governor Teeters suggested that the policy and planning committee be established now and that the issue of whether to establish an executive committee be considered by the policy and planning committee.

In response to a question from Mr. Marrinan, Governor Teeters suggested that Mr. Marrinan be appointed the temporary chair of the policy and planning committee and that the current chair and vice chair work with him to appoint members, with the understanding that when the new chair and vice chair are appointed, they would become members of the committee.*

Thursday, October 27, 1983

I. Review of the Board's Credit Card Study

A. Staff presentation

Mr. Luckett briefed the Council on the findings of the Board's credit card study, which had been mandated by the Cash Discount Act of 1981. The Board was to research the economic effects of charge card usage on consumers, merchants, and card issuers.

The central issue of concern to the Congress, he explained, is whether consumers who pay cash subsidize those who use credit cards insofar

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*The following members also were later appointed to serve on this committee: Mss. Taylor, Rathe, and Quijano and Messrs. Weimer and Van Buskirk.

as the cash customer and the credit customer pay the same price for the goods that they buy. The study found that the cost of credit card transactions is only moderately higher than the cost of cash transactions and that a relatively small proportion of total sales is conducted by credit cards. It follows, Mr. Luckett said, that the impact of credit card costs on prices would be relatively small.

The last chapter of the report studies the question whether retailers can be expected to offer cash discounts. Theoretically, based on the earlier findings, retailers have a weak incentive to install a two-tiered pricing system. Mr. Luckett concluded that it is expected that cash discounts would not be very widespread.

B. Report of the Economic Impact Analysis Committee

Mr. Jackson discussed a paper prepared by the economic impact analysis committee following its review of the Board's credit card study. The committee felt that the study provided a good review of the data that are available. Although any such study has limitations because of incomplete data and therefore tends to be somewhat subjective, the committee felt that the study is the best evidence to date on the complex retail credit cost issue.

Mr. Jackson reviewed a number of the findings of the study and discussed several legislative alternatives that the committee felt may evolve from the study. He pointed out that all of the committee members do not necessarily agree with all of the alternatives. Furthermore, the committee as a group does not endorse any of the following alternatives:

1. Extend the current law which allows unlimited cash discounts and bans a surcharge on credit.

2. Require a discount for cash.

3. Allow or require a surcharge for credit.

4. Preempt state finance charge usury laws.

5. Allow or require a user fee for a credit account.

6. Allow or require finance charges to be assessed from the date of purchase and eliminate forgiveness on any account paid in full each month."

Individual members of the committee then made comments about the credit card study. Mr. O'Connor stated that he is not certain that the cost of credit, a sensitive cost for retailers, is a charge that should be identified and charged for separately.

Mr. Holt discussed his proposal for handling the problem of cash discounts or surcharges. He said that payment services like credit cards are quite distinct from product purchases and should be paid for separately insofar as practicable. The charge for these services should be added to the credit card bill, paid by the user of the services, and collected by the credit card department of the seller or by a third-party credit card service. This charge should not be made at point of product sale. Full disclosure of charges should be made to the credit card user when he obtains the card. The charges made for credit use should cover costs in excess of those incurred when a cash payment is made.

To implement this policy, federal legislation would be needed that would prohibit the adding of the costs of credit card services to cash

customers. The proposed law would need to preempt any state laws that prohibit or unreasonably limit the charges needed to support credit card services. Mr. Holt then discussed more details about his proposal, including transition and enforcement.

Mr. Warne felt that the study of a single issue concerning credit cards overlooks the spectrum of changes that are occurring in the industry. He was concerned that if the federal rather than the state government regulates the credit card industry, the federal government will move to regulate other areas of credit as well, areas that should be left to the state.

Ms. Crockett agreed with Mr. Holt that there should be a separate charge for credit services. She proposed that there be no two-tiered pricing system since neither the consumers nor the retailers like it. For consumers who pay their credit card bills promptly at the end of each month, she proposed that the store be allowed to charge interest from the time of the transaction, if it wishes. For bank card customers who pay off their bills monthly, she proposed that the merchant be allowed to charge a transaction fee at the point of purchase that would be equal to the merchant discount.

C. Council discussion

Council members asked questions about the committee's report and the proposals offered by the individual committee members. Mr. Gatling felt that it would be unfair to penalize the consumer who pays his credit card bill on time. Mr. Van Buskirk stated that when one compares credit

costs with cash costs, one sometimes overlooks many costs that are involved. He agreed with having costs for services and products accurately reflected in the price that consumers pay, but that is not always very easy to do. When a merchant accepts cash, extra security measures are needed, for example.

Several members expressed concern that some members may be over-simplifying the whole issue of whether charging fees for credit card usage would solve the problems. Ms. Sloane listed several other problems that would need to be considered with any of the proposals that had been recommended, such as whether the charge would be per transaction, per number of transactions, how the charge would be assessed, how the sales slip would look, and whether the charges would be based on the amount of money the consumer is spending.

Then members discussed other concerns such as whether a surcharge or a transaction fee at point of purchase would be more feasible, how membership fees would differ from transaction fees, whether membership fees would be affected by competition, and whether credit costs would decrease if state usury laws were preempted. Mr. O'Connor stated that any proposal for passing on the charges for credit to all customers who use credit involves many complicated problems for equitable allocation of the costs; therefore, he was reluctant to support that type of proposal. Ms. Crockett stated that to charge interest from the day of the transaction would be a simple way of allocating the cost of credit without introducing a lot of the problems that Mr. O'Connor envisioned. She felt that a membership fee that would encompass the cost of credit would be a better

solution than adding a transaction fee at the point of purchase. Mr. Marrinan stated that credit cards are only one aspect of the new payments mechanism system that had been developing for several years. He said that to discuss this topic thoroughly, the Council must look at the different subsidies involved in all these payment systems. He stated that this discussion may be premature or taken out of context if there is a recommendation now without that additional perspective.

II. Implications of Recent Deregulatory Initiatives in the Area of Consumer Financial Protection

A. Council presentations

Mr. Christensen summarized the history of banking regulation. For nearly 50 years, he said, financial institution regulation has been aimed at the prevention of failures. History suggests that chances of failure are part of the price a nation must pay to obtain deregulated banking. Mr. Christensen discussed many changes in the banking industry that have occurred since the 1920s and made a number of comparisons with banking as we see it today. He noted the recent increase in the number of bank failures, especially in 1982. During the 1980s thus far, many federal regulations have been removed. Federal deposit insurance may be the last real obstacle standing in the way of free banking.

Mr. Van Buskirk summarized the provisions of the Financial Institutions Deregulation Act, noting that the Federal Reserve supported this bill. He characterized the bill as a re-regulation and a rationalization of the differences between commerce and banking. It allows a broadening of financial powers, such as investment powers and real estate development. In addition, it broadens the definition of an activity

"closely related to banking" to include "services of a financial nature". This broader language will allow banks to expand their services to develop products that their customers want, contingent upon approval by the Federal Reserve.

Then Mr. Van Buskirk turned to a discussion of the Garn bill. He said that the bill will require institutions to disclose to consumers their policies on delayed availability of funds, will allow interest to be paid on checking accounts (for businesses that cannot gain access to a NOW account), and will affirm interstate banking arrangements that have been agreed upon by individual states. He hoped that the entire question of interstate banking will be addressed by the Congress soon.

B. Council discussion

Mr. Clark stated that he would like to see an analysis of the non-regulated financial entities to have reviews of their roles, as well as Community Reinvestment Act abuses. He urged that this analysis be part of the deregulatory initiative. Mr. Fishbein suggested that the long-range impact of deregulation be studied, including the reduction of the access to credit for small businesses. Concentration of industry resources could result from deregulation which may affect the availability of credit for small businesses. Mr. Fishbein said that there are certain procedures and operational styles inherent in large banking institutions that often work to the disadvantage of small business people. He would like to see such matters considered in the public policy discussions.

Several other members expressed concern over the effect of interstate banking on small businesses and community resources. Mr. Cugini suggested that the Council have a presentation on home banking.

III. Regulatory Update

A. Presentation by Mr. Garwood

Mr. Garwood reported on recent Board regulatory actions in the area of consumer financial services. He updated the Council on actions resulting from the Community Reinvestment Act report. A formal, more detailed report would be given to the Council later. Most of the CRA report's recommendations have been adopted. Some of the recommendations not yet adopted will require approval by the Board or further feasibility studies.

1. Consumer leasing. The Board's proposed legislation is moving through the Congress and there seems to be general support for it.

2. Delayed Funds Availability. A federal proposal is now being considered by the Congress. That proposal would require wire notification from the institution on which the check is drawn to the institution of first deposit within 24 hours if the check is over $250 and the check is no good. A hearing was held on the bill and the Board testified, recognizing that this area is a problem but suggesting that perhaps the problem could be handled through a voluntary industry effort and improvement in the check collection process.

3. Regulation B (Equal Credit Opportunity). The regulation is currently under review as part of the Board's ongoing effort to review each regulation to see if the burdens can be reduced while maintaining the protections, and to improve the regulation. Public comment has been solicited preliminarily and the proposed regulation will be reissued for public comment. A staff commentary will be prepared.

4. Preemption of state law. A Mississippi provision which required the Truth in Lending finance charge to be defined slightly differently has been preempted. A South Carolina law has also been preempted. Proposals are under consideration regarding New Hampshire and New Jersey laws.

5. Regulation E (Electronic Fund Transfers) commentary. This commentary will be updated to address some recent issues.

6. Technological developments. Many of the Board's rules deal with copies of written statements and forms that must be provided to consumers. The staff is considering how those items will be integrated with electronic terminals or display screens. The staff also is studying cash management accounts (combination credit card plans and securities accounts).

7. Compliance. The staff has prepared several pamphlets that institutions may use for guidance to comply with the consumer financial protection regulations.

IV. Open Session

A. Council presentation

Mr. Fishbein reported on the meeting of the legislation committee. The committee has begun to consider some issues that its members feel will be on-going, as topics for future Council discussion, such as the Bush Commission recommendations and the continuance of the consumer advisory council function. The legislation committee would want to meet in January 1984, after the Bush Commission recommendations have been made public, to prepare an agenda item for the Council's discussion at the March 1984 meeting.

He hoped that the committee could begin to discuss the impact of the Financial Institutions Deregulation Act on consumers, in preparation for a later Council discussion.

B. Council discussion

Ms. De Witt opened the floor for introduction of topics for future agenda items and for any other topics that members wished to discuss. The following items were suggested as future agenda items:

1. Branch closings and implications of those closings for thrift institutions and urban areas.

2. Truth in savings and shopping for credit in light of deregulation.

3. Summary of the Board's data collection methods.

4. Transitional housing needs for the homeless and the transient and incentives for providing such housing by individuals and businesses in the community.

5. Discussions of various savings methods.

6. Mortgage instruments.

7. A briefing on the state of the art in electronic funds transfer.

The meeting then adjourned.

Ann Marie Bray

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Staff Assistant
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Wanda Baldwin

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WOMEN AT MINNESOTA BANK SELECT AUTO WORKERS FOR REPRESENTATION

WILLMAR, Minn.—(By a BNA Special Correspondent) Employees at the First American Bank and Trust Company in Willmar have voted to join the United Auto Workers, becoming one of the first groups of bank employees to do so.

Following three months of private negotiations, bank employees voted 25 to 15 on Oct. 27 to become a local segment of UAW's Technical, Office and Professional Workers division. UAW Vice President Stephen P. Yokich said the vote would "give new hope to bank employees across the country who are grossly underpaid and sadly overworked."

Cindy Reznecheck, a bank employee, told WFR the workers decided to unionize in order to gain job security, wage hikes, and promotions. The UAW was selected, she explained, because of the union's history of promoting women's rights. The entire bargaining unit is female.

According to UAW spokesman Dick Olson, the UAW also represents bank employees in Pennsylvania and credit union workers in Puerto Rico and Canada. By organizing the Willmar group, UAW is attempting to expand its support for white collar workers, Olson said.

Reznecheck said collective bargaining will be delayed until "things settle down" at the First American Bank, but she indicated that the group hopes to have a contract by the end of the year.

In 1977 a group of eight women from the Citizen's National Bank of Willmar formed a union called the Willmar Bank Employees Association and went on strike to obtain recognition and improved working conditions. The group became known nationwide as the "Willmar 8" but was not able to win its demands. Reznecheck said the First American employees learned from the example of the Willmar 8 and therefore did not attempt to organize independently.

CEA HEAD SAYS MORE TRADE, CREDIT NEEDED TO SOLVE INT'L DEBT PROBLEMS

LOS ANGELES—(By a BNA Staff Correspondent)—A top economic adviser to President Reagan said Oct. 27 that the international debt problem requires a commitment from the governments of the industrial nations to keep their import markets open and to supplement the credit provided to the debtor nations by private bankers.

Martin Feldstein, chairman of the Council of Economic Advisers, told the Los Angeles World Affairs Council, "The only way for the debtor nations to pay the interest on their existing debt and to avoid an unmanageably rapid growth of their debt in the future is by increasing their trade surplus with the rest of the world."

The governments of the United States and other major industrial countries also must supplement the credit provided by the private bankers, Feldstein said. He explained that this can be done through "short term 'bridge loans'... [to] avert financial crises and reassure both banks and borrowers," loans by the International Monetary Fund, and export credits or export credit guarantees for products exported from the industrial countries to the debtor countries.

Although Feldstein's remarks emphasized the role of governments in handling the international debt problem, he said he wanted to leave no doubt about his "belief that the major responsibility lies with the debtor nations and with commercial banks."

"The debtor nations must continue... to guide the process of orderly debt management and must reject outright the illegal and immoral notion of unilateral debt repudiation... It would be helpful also if these governments examined what could be done to increase the inflow of direct foreign equity investment," Feldstein said.

"The commercial banks around the world... must continue to lend more than they want at interest rates that are lower than those that would induce them to provide such credit voluntarily," he continued.

During a press conference before his speech, Feldstein said it would be "a serious mistake" if Congress fails to approve President Reagan's request for an additional $8.4 billion for the IMF because the IMF has "a critical role" to play in resolving the international debt problem.

FED CONSUMER ADVISORS QUESTION FINDINGS OF CREDIT CARD STUDY

Some members of the Federal Reserve Board's Consumer Advisory Council recently took issue with a Fed credit card study that concluded that the merchant overhead involved with credit use drove up prices, and that cash paying consumers were subsidizing credit card users who paid promptly and avoided interest charges.

Despite the reservations expressed by some, the Council proceeded to consider a number of ways to eliminate the "free ride" for credit card customers.

The Council was asked by the Fed to review the study.

"Cash handling is not cheap for business," said Clinton Warne, president of the Consumers League of Ohio, during an Oct. 27 meeting of the Consumer Advisory Council. "There are additional security costs associated with a high volume cash business. There is the cost of a check approval system. There is productive time lost by employees who must count cash receipts and make bank drops," Warne continued.

"It could well be that credit card users subsidize cash customers, instead of it being the other way around," said Henry Sommer, an attorney with Community Legal Services in Philadelphia.

Michael Van Buskirk, a community development officer with Banc One Corporation in Ohio, agreed. "I think there is no question that cash costs, too, and that merchants know this," he said. "An Ohio study of gas stations which sold only for cash showed that cash discounts were mainly a marketing tool, with little saving to the merchant once the costs of a safe, security and more frequent cash pickups were factored in," Van Buskirk added.

The Fed study, "Credit Cards in the U.S. Economy, Their Impact on Costs, Prices and Retail Sales" (41

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WFR 263), determined that a merchant accepting a credit card incurred a cost of 2 to 3 percent of the transaction amount, due largely to fees paid the card issuer by the merchant. The study assumed that merchants would mark up all merchandise to recover this cost, and that cash customers would then be paying an unfair higher price. Congress ordered the Fed to perform the study in the Cash Discount Act of 1981.

The study, which relied heavily on already-existing material, did not present extensive data on the merchants cost of handling credit as opposed to cash payments. But, a report by Payments Systems, Inc. that was cited by the Fed found credit card transactions to be one cent cheaper than cash for the merchant to handle.

A "two tier" price structure, whereby cash customers would pay a lower price than those using credit cards was suggested by the study as a way to "unbundle" credit costs from other overhead. Under this approach, card users would pay the full cost of their credit.

The Fed's 30-member Consumer Advisory Council, which meets quarterly and provides the Fed with advice on banking matters that affect consumers and businesses, questioned other parts of the Board's study as well.

Warne thought the scope of the study was too narrow. "Every month we are seeing developments in the payments system that involve new uses of cards, including point-of-sale and other debit cards with consumer and business impact," said Warne. "To suggest new policy based on just credit cards is like studying one ant in a colony of ants," he continued.

Despite qualms about the Fed's findings, the Council went on to discuss six possible legislative alternatives aimed at eliminating the "free ride" for credit card users. The alternatives included:

- Extending the current law (the Fair Credit Billing amendments to the Truth in Lending Act, due to expire in February, 1984) which allows unlimited cash discounts and bans a surcharge on credit. Council members commented that this path would not resolve any inequity between cash and credit consumers, and that only a "very small percent" of retailers had begun a cash discount policy since authorized to do so in 1978.
- Requiring discounts for cash. Because this would necessitate creation of a two-tier pricing structure with little benefit to consumers or merchants, the Council found that, "In the end, it is questionable whether anybody would gain through this action."
- Requiring a surcharge for credit use. The Council reported that this option would create consumer confusion and would only be another path to a two-tier pricing system.
- Preemption of state finance usury laws. The Council reported that this option would "allow credit grantors to operate in a more open and competitive market," but expressed doubt that Congress would want to override state statutes. Fed Governor Nancy Teeters said the Fed was opposed to preempting state usury laws. "There is a tremendous tangle of state usury statutes," she said. "Massachusetts alone has 50 different usury categories. Unless you know exactly what you want to do, you could triple the Fed staff trying to find out for you," Teeters warned.
- Allowing or requiring a user fee for a credit account. This is currently prohibited by Regulation Z where the finance charge is the maximum allowable by state law. The Council noted that this option would provide revenue from credit users who now pay bills in full each month and are not now charged a finance fee.
- Allowing or requiring that finance charges be assessed from the date of purchase. The FRB study found that 60 percent of credit users pay their bills in full each month, and so get a "free ride" on their share of the credit expense which must be carried by the revolving charge customer and, to some extent by the cash customer. The Council members commented that the "only fair way" to remove all credit inequities was to pro-rate all credit expense to all credit users.

Members also discussed the value of breaking out a "convenience" service charge on credit card transactions that would be paid by the card user without regard to when principal and interest payment occurred.

William O'Connor, Council Vice-Chairman and a Buffalo, N.Y. attorney, questioned how such user fees would be returned to retailer or cash user. Jean Crockett, a professor of finance at the Wharton School, reflected that, "You used to get free gift wrapping in stores, but now you pay. Credit costs will likely take a similar course."

Timothy Marrinan of Minneapolis' First Bank System, Inc., cautioned that, "We are only looking at a small part of the total payment system here. I used to be in favor of cash discounts, but now I think we may be premature," he said.

MONETARY POLICY FORUM SEES LOWER INTEREST RATES, SLOWER GROWTH

Economic activity will slow compared to recent months and interest rates will drop slightly early next year, according to a group of business economists and financial officers who also urged a more accommodative monetary policy.

A survey of its members by the Monetary Policy Forum, headed by former Federal Reserve Governor Andrew Brimmer, shows that the economists expect real gross national product to grow by 5.5 percent in 1984. While that pace is up substantially from the 3.5 percent real growth projected by the survey for 1983, it is a substantial slowing from the third quarter's 7.9 percent actual growth rate.

Survey respondents, and most speakers at the Forum's First Semi-Annual Plenary Session Nov. 1, said they think that projected large federal budget deficits pose the greatest threat to continued economic recovery.

The forum members surveyed said they expect the federal budget deficit—on-budget and off-budget—to be $186 billion in fiscal 1984, compared to $205 billion in 1983.

Most of the respondents said they expect the federal funds rate to decline slightly over the rest of 1983 and first part of 1984, before increasing moderately in the

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Senator PROXMIRE. Now, Mr. Hammelman, in your testimony you talked about how unscrupulous merchants could use the credit surcharge to increase prices. If that's the case, why couldn't they use the cash discount program for the same purpose, raising their regular price dramatically and then offering a discount for cash?

Mr. HAMMELMAN. Well, they could. I think the point in the surcharge case is the customer is negatively surprised; in the case of the discount for cash, at least the consumer has a mechanism to access some lower price irrespective of which is the right price.

Senator PROXMIRE. Now, Mr. Hammelman, you believe in the free market system I'm sure, and would you agree that the retail industry is extremely competitive?

Mr. HAMMELMAN. I would agree with that, Senator.

Senator PROXMIRE. And that over time, therefore, that the market itself should take care of this?

Mr. HAMMELMAN. I would agree that the market would take care of it. I'm concerned about the length of time and the problems in between which I think are avoidable by simply sticking with the cash discount approach.

Senator PROXMIRE. Now you expressed concern about confusing the consumer and about the importance of the Truth-in-Lending Act. Consumers are capable of comparing limited amounts of information; the problem is whether we're requiring too much information. I assume you have no problem with authorizing credit card issuers to impose annual fees, yet that could be viewed as violation in principle of the Truth-in-Lending Act.

Would you oppose legislation to permit card issuers to impose transaction fees?

Mr. HAMMELMAN. Transaction fees to the cardholder, Senator?

Senator PROXMIRE. That's right.

Mr. HAMMELMAN. I would not oppose that, no.

Senator PROXMIRE. Well, the objective of the truth-in-lending is to aid consumers in making choices among different credit programs. So I don't see any inconsistency between that objective and a system that has two or three figures clearly disclosed to the consumer up front. Why should there be confusion.

Mr. HAMMELMAN. In the case of issuing a credit card and establishing an account, the cardholder gets a contract and by a very precise process of compliance with the law the cardholder consumer is permitted to evaluate the price for that service.

The problem with the surcharge, in my opinion, is the variability of the surcharge and also that there is the strong possibility the consumers will not be aware of the surcharge or the magnitude of the surcharge until they are fairly well along and committed to the purchase and thus stuck with no other option. I think that is the difference.

To your point about the consumer's ability to comprehend these things, I fully agree with it, but someone will have to communicate it and some amount of time will have to pass before they know.

Senator PROXMIRE. Mr. Menell, on page 5 of your testimony you say, "The consumers pay lower prices for the cash discount but would pay higher prices for the credit surcharge." We're dealing with a highly competitive market, as you indicated. If the merchant does not have undue market leverage necessary to increase

his profit margin, wouldn't the practical effect of a credit surcharge be exactly the same as the cash discount system?

Mr. MENELL. Senator Proxmire, I think the answer is no. I think they are perhaps theoretically interchangeable, a cash discount and a credit surcharge. However, I don't think the marketplace works that way. Moreover, I don't believe most merchants think that way.

I believe, as discussed earlier, the ability to surcharge would certainly tax the credit card user. But I do not believe that prices to the cash-paying customer would automatically be reduced. I do not think that the merchant has much incentive to reduce prices—nor is there enough competition in the marketplace to restrict the amount of surcharges—because the relationship between the merchant and the customer is oftentimes a captive relationship.

Senator PROXMIRE. Well, if the merchant has the market leverage to extract additional profits in a credit card surcharge system, why isn't he doing it now by simply raising the price of his product?

Mr. MENELL. To recapture his cost of——

Senator PROXMIRE. Why doesn't he just raise his price? After all, the name of the game, the bottom line, as they say at Harvard Business School, is your profit. That's what you're after, American Express or anyone else. Why isn't he just raising his price now?

COMPETITION RESTRAINS PROFIT MARGINS

Mr. MENELL. To the extent of the best of his ability as a merchandiser of goods and services he will do that. Competition does restrain his ability to increase his profit margins.

Senator PROXMIRE. Exactly; exactly; competition restrains it and competition would also restrain his abusing any advantage that he got on the credit card surcharge, too, would it not?

Mr. MENELL. Are you suggesting that credit card surcharges should be authorized as another competitive tool?

Senator PROXMIRE. Well, credit card surcharges are an additional way for him to be reimbursed for the cost which he has to pay to the credit card company. He has to pay 3 to 5 percent of the cost of the merchandise he sells to the credit card company or the price that he sells it at.

Mr. MENELL. I think those are exactly the reasons that Congress has created the two-tier pricing system we now have to differentiate between cash-paying and credit-paying customers.

Senator PROXMIRE. And I'm saying why not make it complete? Why not let the merchant use his own discretion whether he wants to have cash discount or credit surcharge?

Mr. MENELL. That may be terribly confusing to consumers, and terribly expensive, and confusing to merchants, and it may also cause prices of most goods and services to go up.

Senator PROXMIRE. Now you're an able man. You served on this committee as staff man with great distinction for years. Isn't really money what we're talking about? What was American Express' revenue from merchant discount fees in 1983?

Mr. MENELL. Senator, I wish I had a copy of the annual report with me.

Senator PROXMIRE. Well, roughly, how many hundreds of millions of dollars?

Mr. MENELL. Roughly, I think it's higher than that.

Senator PROXMIRE. How many billions of dollars?

Mr. MENELL. $1 billion.

Senator PROXMIRE. Let's look at it another way. The Commerce Department estimated total retail sales in 1982 as $1.074 trillion. If we subtract automobile and grocery sales where credit cards aren't used, we're talking about $643 billion. If the Fed is right and credit cards add 1 percent to the price of goods, then that's a bill of more than $6 billion. You would dispute that and say that credit doesn't add any additional cost; is that right?

Mr. MENELL. Yes, sir, and provides additional benefits.

Senator PROXMIRE. Well, that may be. Will you indicate in your document that position, furnish the study that you said supports that to us, in view of the fact that the Federal Reserve Board was aware of that study when it made its conclusion that it costs 1 percent or $6 billion?

Mr. MENELL. Yes, sir. (See p. 122.)

Senator PROXMIRE. And you suggest we need further study. We've been looking at this issue for 10 years. Now we have a Fed study. I think we've studied the problem long enough. You just don't agree with the study and now it's time to settle the issue once and for all, it seems to me.

Let me just ask a couple of questions of Mr. Russell.

Mr. Russell, you say that a mechanism already is in place for two-tier pricing if the merchant concludes that the cost of accepting credit cards is greater than the cost of accepting cash?

Mr. RUSSELL. That's correct.

Senator PROXMIRE. First, I'd like to commend you for admitting the possibility at least that credit would be more costly than cash.

If you're concerned about confusion and having both cash discount and credit card surcharge programs operating at the same time, how would you feel about prohibiting cash discounts but permitting credit surcharges?

IMPACT OF PROHIBITING CASH DISCOUNTS BUT PERMITTING SURCHARGES

Mr. RUSSELL. I think that's a giant step backward. If you were to go that route you would put upward pressure on pricing rather than downward pressure that exists by virtue of discounting, and it further confuses the issue with respect to the intent of the Truth-in-Lending Act, which was to advise borrowers of the total costs for participating in credit programs. I see no benefit from it, none whatsoever. If there was a benefit, perceived or real, with respect to permitting surcharges and refusing discounts, I would say it becomes a moot point. However, the benefits all seem to favor cash discount as opposed to surcharges.

You mentioned the fact that merchants would normally tend to increase and maximize profits to the extent possible, irrespective of whether they offered discount or imposed surcharges. I agree wholeheartedly that merchants are in business to make money and the greater they can maximize profits, the better as far as they are

concerned. However, they also have an advertising problem of trying to get the consumer in the store in the first place. It would seem to me that with respect to at least getting the consumer into the store the pressure would be to hold down the stated price to its lowest possible level and then if he wished to offer cash discounts on top of that he would have the opportunity to do so, but it would tend to force pricing down rather than force pricing up, which is what I think would be the natural evolution of having a surcharge.

Senator PROXMIRE. Mr. Russell, I'm really astonished. I would think that a man like you who represents VISA and obviously has great regard for the free market system would recognize that if you give the merchant the freedom to use either a cash discount or a credit surcharge, either one, that he would choose the system that would enable him to get the greatest benefit, and he gets the greatest benefit by, as you say, by being able to advertise the lowest price. With the cash discount he can't do that or doesn't do that. What he does is he says this is my price and if you come in and pay cash it's 4 percent less than that. If there's a credit surcharge, he ends up in exactly the same place as far as his greatest concern except he can advertise a basic lower price.

Mr. RUSSELL. If you subscribe to the tenet that this is truly Adam Smith's world, then you would also have to subscribe to the tenet that the lowest possible price is going to be advertised because that's the only way to get the customer in the front door. Then if he has an additional goodie to heap on top of that in the form of a cash discount, he'll do it. Otherwise, he doesn't get the man in the door and the surcharge doesn't apply anyway. I don't follow the logic.

Senator PROXMIRE. I don't follow yours, but maybe I shouldn't detain the committee any longer, so I'll thank the chairman and go after the next panel.

Senator GORTON. Thank you. Thanks to all three of you. We appreciate your attendance and your help.

Panel 3 consists of Mr. Chisholm, Mr. Larkins, and Mr. Rasheed, if they would step forward. As is the case with each of the other panels, your entire statements will be included in the record.

STATEMENT OF PHILLIP R. CHISHOLM, EXECUTIVE VICE PRESIDENT, NATIONAL OIL JOBBERS COUNCIL

Mr. CHISHOLM. Thank you very much, Mr. Chairman. In the interest of time, I will try to summarize my statement with a few brief comments.

My name is Phillip Chisholm and I'm executive vice president of the National Oil Jobbers Council.

The NOJC is a federation of 42 State and regional associations representing over 11,000 small business marketers of gasoline, distillate fuels, and other petroleum products.

I'd like this morning, if possible to talk about some of the problems which have confronted our members as a result of the ban on surcharges and Cash Discount Act by describing a little bit of the history that led up to those problems and what we see as a potential solution to that.

PROBLEMS AND POTENTIAL SOLUTION

Prior to January 27, 1981, the major oil companies were effectively prohibited from collecting the cost of credit separately from the price of petroleum products by the DOE pricing regulation. Under the normal business practice rule they had to continue business practices they were engaged in on May 15, 1973, and under that particular rule they were not passing through the credit card surcharge at that time and were thus unable to do it until decontrol of the petroleum industry in January 1981.

At that point several companies began—or shortly thereafter, several companies began passing through surcharges to their wholesalers as a separate item from the price of the petroleum product itself.

Now that created a particular problem for the wholesalers and retailers in that they were unable to pass the surcharge through to the ultimate consumer. I think everyone recognized that there was an obvious cost of credit that had to be recovered and we were the only ones the refiners could recover it from.

They were limited in other options of recovering costs of credit and we were the ones that every other industry recovered the cost of credit through and quite naturally it would be passed on to the ultimate consumer theoretically.

In the gasoline marketing industry however, it doesn't work that way. You have a highly competitive industry where people hang the signs out in front of the service station for every customer to see. It is a very price sensitive market. What we found is that many marketers weren't able to recover that surcharge in the price of product from the ultimate consumer and, as a result, we had reports of our members swallowing as much as $3,500 to $7,000 a month in additional credit card costs.

Whenever we confront the companies with this particular problem we tell them we have no other way to recover the cost of that credit; we have no flexibility. And several companies have experimented with programs such as the Cash Discount Act, which have created substantial problems for our members primarily because of the conflicting State laws that are involved. Some States require that you cannot have a separate cash and credit price and have split islands, some prohibit an island that sells cash and an island that sells credit. Some State laws say that you can't sell both ways at the same pump. Others say you have to post credit price regardless of whether it's a pump that only sells cash.

So as a result of these conflicting State laws the Cash Discount Act really has not been an adequate solution to meet the problems our particular industry has faced.

The solution to these problems that NOJC is proposing is something that would allow the credit card user and the marketer more flexibility in terms of recovering the cost of credit while at the same time placing the primary burden on the cost of credit on the user of the credit card.

What we would essentially propose is the preemption of those State laws that prohibit transaction fees and annual fees as well as preemption of some of the usury ceilings which do not enable the

independent petroleum marketers to pass through the cost of credit to the ultimate consumer.

Now we think by authorizing this type of flexibility within the system the petroleum marketers and the entire industry will benefit from the true credit card program.

I have attempted to summarize my remarks in the interest of time. I know this committee would like to get out of here and proceed to other business, so I will answer any questions you may have later on.

[The complete statement follows:]

TESTIMONY

PRESENTED BY

PHILLIP R. CHISHOLM
EXECUTIVE VICE PRESIDENT

NATIONAL OIL JOBBERS COUNCIL

Good morning Mr. Chairman and members of the Subcommittee. My name is Phil Chisholm and I am Executive Vice President of the National Oil Jobbers Council, a federation of 42 state and regional associations (see Attachment 1) representing over 11,000 small business marketers of gasoline, distillate fuels and other petroleum products. Although our association's membership is composed primarily of small businesses, collectively it markets nearly 50 percent of the motor gasoline and 85 percent of the home heating oil sold in the United States. Approximately 78 percent of the gasoline sold by independent jobbers is "branded" product. Roughly one quarter of the branded gallons sold in the U.S. is paid for by approximately 600 million credit cards.

For more than 50 years consumers have been able to charge as much as $100 million worth of gasoline purchases every day at their local service stations. As long as they paid their bills on time, the use of the credit card cost them nothing, making credit, according to Business Week, perhaps "the most pervasive giveaway used by oil companies to sell gasoline." (see Attachment 2)

Skyrocketing costs of credit and declining margins forced refiners to begin to reevaluate their marketing strategies, however; and in recent years they began to look for ways to recoup their credit costs. Before 1981, the Department of Energy (DOE)'s Normal Business Practices Rule prevented refiners from imposing more stringent customer credit terms: thus, refiners were limited in their ability to recover the full extent of soaring credit card costs. Charging the motorist for the use of credit on a uniform basis at the card issuing level was effectively prohibited by a complex set of different state laws. On January 28, 1981, President Reagan deregulated crude oil and gasoline,and the refiner's downstream purchasers became a prime target upon which to shift costs associated with credit card transactions.

Freed from the constraints of DOE controls, Texaco led the way, imposing a 3-cent-per-$1.00 of credit volume charge for services historically included in the wholesale price of gasoline. Other companies shortly followed suit, some imposing fees as high as 4 cents for every dollar's worth of credit. Today, the oil company credit card user is still sheltered from having to pay the full costs of credit. But the marketer surcharge programs cost the typical marketer selling approximately 4.4 million gallons of gasoline per year, as much as $3,500 to $7,000 per month depending upon the percentage of total gasoline gallons sold by credit card, and the marketer's ability to recoup costs through a cash discount program. Due to the application of federal and state laws and fiercely competitive market forces, marketers are forced to absorb much of the additional costs of the refiner credit card, thus putting a severe strain on cash flows. Since 1980, the number of marketers has declined by more than one-third. While this decline is certainly not solely as a result of the credit card surcharge situation, the fact that marketers are unable to recoup the charges passed on to them by their suppliers is certainly a large contributing factor in reduced cash flows. There are three major reasons why marketers cannot recover these costs associated with credit transactions. They are: (1) the surcharge ban; (2) the difficulties associated with cash discount programs; and (3) competitive pressures.

Prohibition Against Surcharges

First, as you know, marketers are legally restrained from directly recouping their costs of credit from the consumer by force of the Federal Truth in Lending Act (TILA), which prohibits surcharges at the point of sale. The current structure of the law allows refiners to pass through their credit card costs to the marketer, but prohibits marketers from imposing surcharges on their retail customers. We are thus finding ourselves between the proverbial rock and hard place as a result of this aspect of the current law.

Cash Discount Programs

Secondly, cash discount programs are of limited cost effectiveness to marketers, nightmarishly difficult to implement, and highly regulated by the states. The wide variety of pricing options at service stations -- cash, credit card, full service and self service for each type of gasoline -- has left consumers befuddled and has created headaches for gasoline marketers. Problems of attendants failing to give the consumer the proper discount, or even charging the unwary consumer the credit card price when in fact cash was paid, and then pocketing the difference, have tarnished the image of the entire petroleum industry.

Cash discounts were first authorized by Congress pursuant to the Fair Credit Billing Act of 1974. Congress' objective was to encourage the proliferation of cash discounts in the marketplace so as to allow merchants to offer programs under which cash customers do not pay the inherent costs of credit. However, due to the complicated regulatory framework of the TILA, most merchants did not attempt to offer cash discounts. Those who did were confronted by claims of "surcharge" by the Federal Trade Commission and abandoned their attempts to establish cash discount programs.

In its second attempt to promote two-tier pricing, Congress enacted the Cash Discount Act in 1981 to remove the 5 percent lid on discounts, and to remove the legal and contractual impediments to two-tier pricing systems so as to allow merchants the flexibility they need to successfully implement these programs.

As the Federal Reserve Board's Report on Credit Cards in the U.S. Economy (Federal Reserve Board Report) demonstrates, Congress' second attempt in 1981 to eliminate impediments to the offering of cash discount programs has accomplished little more than its first attempt in 1974. Part of this lack of success is attributable to the administrative nightmare created by the legal fiction between cash discounts and surcharges. Just as important, however, is the myriad of conflicting and confusing state regulations that have developed which go far beyond the basic federal requirements for cash discount programs of clear and conspicious disclosure, and availability to all prospective buyers. For example, in New Hampshire, marketers are prohibited from utilizing separate islands for cash and credit card sales although this marketing strategy is expressly permitted under Federal Reserve Board regulations. In Washington and New Jersey, marketers are not permitted to post cash prices in cash only pump meters, although this too is permissible under federal law (see Attachment 3, Appendix H). In addition, discounts in New Jersey are limited to the approximate economic value to the retailer of providing the discount, a

requirement which we believe to be in contravention of Congressional intent when it acted to remove the 5 percent ceiling. California and New York do not allow cash and credit sales from the same pump. Virginia and Alabama do.

The National Conference on Weights and Measures has also established guidelines to regulate the offering of cash discounts. Although NCWM guidelines carry no force of law, a number of states have adopted them. These guidelines, among other things, require the credit card price to be metered on a pump used for both cash and credit card sales, although both the Federal Reserve Board and the Federal Trade Commission have stated that this is not required (see Attachment 3, Appendices C and G).

Some months ago, NOJC asked the Federal Reserve Board to rule that these restrictive state laws and NCWM guidelines are inconsistent with federal law, so that marketers and consumers all could benefit from one clear standard for cash discounts (see Attachment 3). A few days ago the Federal Reserve Board issued a ruling that allows these confusing and restrictive cash discount regulations to stand. NOJC has thus exhausted its administrative remedies at the federal level to ensure wide flexibility in the offering of cash discounts. Congress' intent to allow merchant flexibility in these matters has, we believe, been thwarted.

Competition

Even absent restrictive state regulations to limit cash discount programs, gasoline marketers nationwide face still another problem common to all segments of the petroleum industry -- economic pressures. This brings me to the third reason why gasoline marketers cannot recoup credit costs -- competition.

The Federal Reserve Board Report raises the central question -- can retailers in an intensely competitive market, even if they are permitted to add a surcharge for credit, recoup costs associated with credit cards? The answer, in a nutshell, is found on page 62 of the Report. "...[I]n a highly competitive situation, any attempt by a seller to raise prices above a market-determined level would result in a pronounced shift of sales to competitors .. if prices are raised, at least some sales are lost."

Gasoline marketing is just such a highly competitive industry. It offers a large number of sellers (with small shares of the local market), ease of entry, and an undifferential product. Gasoline is highly price sensitive. As one senior vice president of marketing stated recently, "Price is the single most important ingredient in the marketing of gasoline today. A penny a gallon at critical price levels makes a whale of a difference." (See Attachment 4)

Unlike department stores, in which reputation, ambience, quality and selling policies all affect the customer's perception of the commodities sold there, and the price he or she is willing to pay, gasoline service stations sell a largely undifferentiated product, but for octane levels and lead content. Motorists are extremely sensitive to price changes and are beginning, to some extent, to forego brand loyalty in favor of the lowest price. Consumer perceptions, coupled with oversupply and declining demand, have combined to make gasoline an intensely competitive product in a intensely competitive marketplace. Margins are razor thin; and in fact some marketers are selling at a loss in an attempt either to keep their dealers competitive or to hang on

until innovative marketing techniques take hold and begin to show a profit. In such a retailing market, it is very difficult for marketers to attach a surcharge to the usual price without a significant loss of customers.

But we are not here to ask this subcommittee to take action to protect us from competition. We believe in the free market system. Rather, we are here to ask this subcommittee to remedy the effects the Truth in Lending Act is having on the ability of our businesses to compete.

The Solution

For Congress simply to extend the surcharge ban for another long term period would, we believe, be contrary to the interests of marketers and consumers alike. Such action would only perpetuate the present situation in which, according to the Federal Reserve Board Report, cash buyers continue to subsidize credit card users, and cash discount programs are "the exception rather than the rule". Rather, NOJC believes that the correct solution is one which changes the law to allow marketers as well as credit card issuers maximum flexibility within the law.

Three years ago, in February 1981, NOJC submitted testimony on the Cash Discount Act before the House Banking Committee (see Attachment 6). In our statement we asked the Congress to let the surcharge ban contained in the Truth in Lending Act expire. Since that time, we have been given to understand that legal and technical problems will arise if the ban on surcharges is allowed to expire, without at the same time addressing the multitude of problems which may arise by the application of the several states' usury laws to the surcharge question. Over the last year, we have joined efforts with the American Petroleum Institute to develop suggested amendments to the Truth in Lending Act which will accomplish our mutual objectives. The proposed amendments would allow the imposition of both annual participation fees and transaction fees, continue to permit cash discount programs, and preempt state usury and consumer credit laws. This state preemption is a critical element in assuring that credit card issuers have the broadest flexibility in recouping their costs of credit. If the card issuer can assess fees directly on the cardholder, then, we believe, the pressure to recover credit-related costs from wholesalers and retailers will be relieved. A copy of our proposed amendments is attached to my statement (see Attachment 5).

We certainly do not claim that our solution is perfect however, and would be willing to work to achieve any remedy which broadens the abilities of all segments in the "credit chain" to fairly recoup their credit card costs. Our primary concern is that marketers not be "boxed in" to a situation in which they are prohibited from passing through the credit card costs imposed by their suppliers.

NOJC realizes that the issues are complicated, and the solutions not easy. However, the problems created by the surcharge ban will not go away. It is time for the credit card customer to be made aware that credit services, while convenient, are not free. Congress must act to place the costs of credit fairly where they belong -- not on the cash paying customer, not on the marketer, but upon the beneficiary of the credit services -- the credit card customer.

Attachment 1

MEMBERS OF THE NATIONAL OIL JOBBERS COUNCIL

NOJC represents these member associations:

Alabama Petroleum Marketers Association
Arizona Oil Marketers Association
Arkansas Oil Marketers Association, Inc.
California Independent Oil Marketers Association
Colorado Petroleum Marketers Association
Independent Connecticut Petroleum Association
Florida Petroleum Marketers Association
Georgia Oilmen's Association
Idaho Oil Marketers Association
Illinois Petroleum Marketers Association
Indiana Oil Marketers Association, Inc.
Intermountain Oil Marketers Association
Petroleum Marketers Of Iowa
Kansas Oil Marketers Association
Kentucky Petroleum Marketers Association
Louisiana Oil Marketers Association
Maine Oil Dealers Association
Michigan Petroleum Association
Mid-Atlantic Petroleum Distributors Association, Inc.
Mississippi Petroleum Marketers Association
Missouri Oil Jobbers Association
Montana Chapter, Intermountain Oil Marketers Association
Nebraska Petroleum Marketers Inc.
Independent Oilmen's Association of New England
Fuel Merchants Association of New Jersey
New Mexico Petroleum Marketers
Empire State Petroleum Association
North Carolina Oil Jobbers Association
Northwest Petroleum Association
Ohio Petroleum Marketers Association
Oklahoma Oil Marketers Association
Oregon Oil Jobbers Association
Pennsylvania Petroleum Association, Inc.
South Carolina Oil Jobbers Association
South Dakota Independent Oilmen's Association
Tennessee Oil Marketers Association
Texas Oil Marketers Association
Virginia Petroleum Jobbers Association
Washington Oil Marketers Association
West Virginia Oil Jobbers-Distributors Association
Oil Jobbers of Wisconsin, Inc.
Wyoming Petroleum Marketers Association

National Oil Jobbers Council
1707 H Street, N.W.
Washington, D.C. 20006

(202) 331-1198

Attachment 2

MARKETING

Gas credit starts to evaporate

While U.S. motorists are enjoying the first decline in gasoline prices in nearly a decade, they face the imminent loss of a benefit many have grown accustomed to receiving with gasoline: free credit.

For more than 50 years, consumers have been able to charge gasoline purchases at most service stations. As long as they paid within 30 days of the billing date, the credit purchases have cost them nothing, making credit the most pervasive giveaway used by oil companies to sell gasoline. Now, however, the soaring cost of financing the more than $100 million worth of gasoline believed to be sold on credit every day is forcing oil companies to rethink this time-honored marketing strategy.

Of the major oil companies, only Atlantic Richfield Co. has abandoned credit altogether. On Apr. 15, ARCO quit accepting credit cards at its 7,000 U.S. retail outlets. Exxon, Texaco, and Indiana Standard (Amoco) are all trying to work out a system that will encourage their dealers to offer discounts for cash. And nearly every oil company is searching for ways to recoup more of the growing cost of providing credit, estimated to be from 6¢ to 9¢ per gal.

"The issue," says Robert C. Carr, treasurer of Mobil Corp.'s marketing and refining group, "is whether more of the cost of the credit card operation can be put on the credit user so the cash customer can enjoy a lower price."

Federal truth-in-lending laws prevent oil companies from simply tacking on surcharges for credit at the point of purchase. And consumer surveys have indicated sharp resistance to the idea of paying an annual fee for oil company credit card use. A survey conducted for Texaco, for example, found that more than half the company's current cardholders would be unwilling to pay an annual fee for the credit card privilege. Some 21% of Texaco's customers indicated that without credit cards they would take their business elsewhere.

The next ones. So far, Texaco is the only company to impose a processing fee on its dealers and wholesalers for all credit card charges. The Exxon Corp. and Amoco programs are testing similar fees, but they have been applied in only a few cities. And Mobil, which introduced a processing fee in 1980, has not yet applied that fee to gasoline products but only to auto parts and services sold in some of its stations.

The effect of the Texaco program, which began Nov. 1, was to charge dealers 3¢ per $1 of credit volume for a service historically included in the wholesale gasoline price as part of the franchise. To soften the blow, Texaco cut its wholesale price and boosted its promotion efforts to draw more customers into Texaco stations. Since then, Texaco's wholesale pricing "has been much more aggressive," says Thomas F. West, executive director of the National Association of Texaco Wholesalers. But, he adds, "our people are worried about the long term. They'll have to continue to meet their competition on prices, but the surcharge will always be there."

Texaco's program essentially shifts to the dealers the problem of getting customers to bear the cost of credit. That, in turn, requires creating a two-tier pricing system that offers discounts for cash. But cash discounts can be "administrative nightmares," one oil executive notes. Some state laws require that the highest prices be posted publicly, while other states require that all product prices be posted. Some even insist that a separate pump be provided for each differently priced product. In those states, at least 12 pumps and four pump islands would be required at stations that want to offer self-service and full service, as well as cash and credit options, on each of three different grades of gasoline.

"We think the discount for cash is confusing," says J. Peter Dailey, who heads Shell Oil Co.'s gasoline marketing operations in the West and Southwest; Shell has not imposed any fees for credit use. "The logistics are impossible," adds George Babikian, ARCO's senior vice-president for marketing.

While no effective mechanism has yet been worked out to charge cardholders for the expense of credit, most industry executives believe that retail gasoline customers can eventually be segmented into two groups: those interested only in the lowest price and those who will pay extra for service, convenience, and credit—the amenities usually associated with brand names. In its move to eliminate credit, ARCO is gambling that the price-conscious segment is the one that will grow fastest.

Gasoline buyers will now have to make a choice: Either lower price or credit, not both

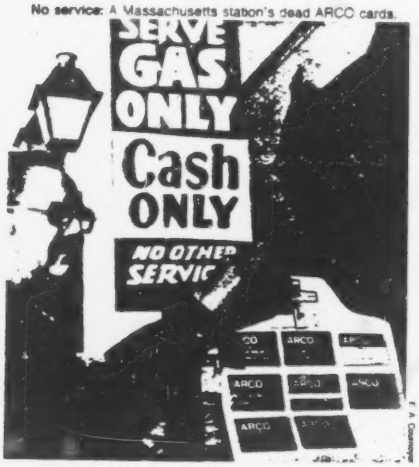
"Brand loyalty began to disappear with the first oil embargo," Babikian argues. He notes that in the late 1960s, independent gasoline retailers, who rarely offer credit but usually offer lower prices, held less than 25% of the gasoline market. With that same group now holding nearly 40% of the market, Babikian claims "the customer is sending out a loud and clear signal."

Although ARCO expects to lose as many as one-third of its former credit customers with its new policy, Babikian thinks the company can more than make up for that with new customers attracted by lower prices. ARCO intends to keep its prices within 1¢ of those set by competing independent dealers.

The high road. At the other end of the market, Gulf Oil Corp. is promoting quality and service and is expanding its credit card program. Gulf's gamble is that the "high-priced" segment of the market will provide better long-term margins. In fact, Charles H. Bowman, president of Gulf's refining and marketing group, believes this strategy will increase the company's return on its service station investment.

If Babikian is right, Gulf is going after a shrinking piece of the gasoline market. Still, both Gulf and ARCO have clearly staked out their positions for an era in which cash buyers will no longer subsidize credit buyers, and credit customers will pay more of their own costs. "We feel that's probably the direction which the marketplace will be moving," concedes Mobil's Carr. ■

No service: A Massachusetts station's dead ARCO cards.



MARKETING

National Oil Jobbers Council
1707 H Street, N.W. 11th Floor
Washington, D.C. 20006 202/331-1154

E-83-113

June 6, 1983

William W. Wiles
Secretary
Board of Governors of the
Federal Reserve System
Room B-2223
20th and Constitution Streets, N.W.
Washington, D.C. 20551

Dear Mr. Wiles:

Attached please find the National Oil Jobbers Council (NOJC)'s request for a determination that certain provisions of law enacted by the states of New Hampshire and New Jersey, regulations promulgated pursuant to these statutes, and enforcement guidelines establishing procedures for the offering of cash discounts at gasoline service stations are inconsistent with federal law. This request is filed pursuant to Section 111 of the Truth in Lending Act and Section 226.28(a)(1) of Regulation Z, and in accordance with 12 CFR Part 252. A hearing is not requested at this time.

Respectfully submitted,

Barbara J. Faulkner
General Counsel

BJF/tdm

enc.

Distribution: Executive Committee, Association Executives, Motor Fuels Steering Committee

A Federation of Independent Petroleum Marketers Founded in 1941
Merged with the National Oil Fuel Institute in 1974.

Request for Determination

Introduction

Pursuant to Section 111 of the Truth in Lending Act and Section 226.28 (a)(1) of Regulation Z (12 CFR Part 226), the National Oil Jobbers Council (NOJC) hereby requests the Board of Governors of the Federal Reserve System (Board) to issue a determination that certain provisions of the laws of the states of New Hampshire and New Jersey governing the offering of cash discounts at gasoline service stations are inconsistent with the Truth in Lending Act (TILA) and Regulation Z, and therefore preempted. The relevant portions of the federal law for purposes of this request for determination are:

(1) Section 103 of the Truth in Lending Act (15 U.S.C. 1602) (Appendix A)

(2) Section 167(b) of the Truth in Lending Act (15 U.S.C 1666f (b)) (Appendix B)

(3) Official Staff Interpretation of Regulation Z, Section 226.4(b)(9)-3 (47 F.R. 41328, September 20, 1982) (Appendix C)

The questions presented for determination are:

(1) Whether a New Jersey law (Appendix D) requiring the meter on a gasoline pump dedicated soley to cash sales to display the higher credit card price is contradictory to or inconsistent with federal law;

(2) Whether a New Jersey law requiring the meter on a gasoline pump utilized for both cash and credit sales to display the higher credit card price is contradictory to or is inconsistent with federal law;

(3) whether a New Hampshire law (Appendix E) prohibiting the use of separate islands for cash and credit sales is contradictory to or inconsistent with Federal law;

(4) whether a New Jersey ruling (Appendix F) limiting a cash discount to an amount equal to the value to the gasoline dealer of an immediate cash payment is contradictory to or inconsistent with Federal law.

Discussion

In determining whether a state law is inconsistent with federal law, Section 226.28(a)(1) of Regulation Z, which implements Section 111 of the TILA, provides that a state requirement is contradictory, and therefore preempted, if it significantly impedes the operation of the federal law or interferes with the purposes of a federal statute. In order to make a determination whether the New Jersey or New Hampshire laws and regulations are inconsistent with federal law, then, one must first examine the TILA, its legislative history, and the regulations promulgated by the Board to interpret and implement the TILA.

History of the Federal Law

Cash discounts were first authorized by Congress pursuant to the Fair Credit Billing Act of 1974. Congress' objective was to encourage the proliferation of cash discounts in the marketplace so as to allow merchants to offer programs under which cash customers do not pay the inherent costs of credit. However, due to the complicated regulatory framework of the TILA, most merchants did not attempt to offer cash discounts. Those who did were confronted by claims of "surcharge" by the Federal Trade Commission and abandoned their attempts to establish cash discount programs.

In its second attempt to promote two-tier pricing, Congress enacted the Cash Discount Act to remove the 5 percent lid on discounts, and to remove the legal and contractual impediments to two-tier pricing systems so as to allow merchants the flexibility they need to successfully implement such programs. This intent is clearly evidenced in the Senate Report No. 97-23, February 27, 1981, to accompany S. 414, the Cash Discount Act (Report) as follows:

> "While removal of the present 5 percent ceiling should result in a greater availability of cash discounts, the Committee is concerned that the complex regulations which implement the present act's consumer protection requirements may also be partly responsible for the paucity of discounts. In testimony before the Consumer Affairs Subcommittee, the Federal Reserve Board acknowledged that these complicated regulatory requirements are probably a significant factor in discouraging merchants from offering cash discounts.
>
> Accordingly, the Cash Discount Act makes two changes to attempt to eliminate this impediment.
>
> First, this bill would explicitly abrogate the present regulations of the Federal Reserve Board. Although the Federal Reserve Board has already proposed a vast reduction in the regulatory requirements as part of Regulation Z simplification, this would give congressional support to the effort to eliminate all, or at least most, of the regulations.
>
> Second, while still requiring sellers to offer discounts to all prospective buyers and to clearly and conspicuously disclose their availability, the Committee eliminated that provision of present law which requires that this be 'in accordance with regulations of the Board.' Recognizing that the Federal Reserve Board still has general rule writing authority under Truth in Lending, this is intended to indicate Congress intent that there be no regulations other than those that are absolutely necessary.
>
> It is contemplated that the requirement of clear and conspicuous disclosure will be enforced by the regulatory agencies and the courts with flexibility. Each individual merchant should be free to determine what manner or method of disclosure best suits his or her purpose, so long as a

> good faith effort has been made to clearly and conspicuously disclose the availability of cash discounts." Report at page 76. (Emphasis supplied)

The intent of Congress could not be more clear. Aside from requiring that discounts be offered to all prospective buyers and their availability be clearly and conspicuously disclosed, Congress mandated that there be no regulations other than those that are absolutely necessary, so as to ensure merchant flexibility.

The myriad of state regulations appear to be motivated in part by confusion surrounding the definition of the word "surcharge". The answer to what constitutes "surcharge" can also be found within the Report:

> "The Committee recognizes that while discounts for cash and surcharges on credit cards may be mathematically the same, their practical effect and the impact they may have on consumers is very different. This difference is best illustrated through the definition of 'regular price.'
>
> The 'regular price' definition requires that if one price is tagged or posted, that price must be the higher price, namely, the credit card price. On the other hand, merchants can tag or post two prices, in which case the higher is the credit price and the lower the cash price. Precluded by the language of this bill, however, is the possibility that a merchant will tag or post only the lower price, and thereby charge the customer who pays by credit card a higher price than disclosed. This possibility is also directly and specifically prohibited by the ban on surcharges contained in Title II of the bill reported by the Committee as well as by the definition of 'regular price.'
>
> Therefore, the Committee's bill permits merchants to have two-tier pricing systems and to offer a differential between the credit price and the cash price. It also permits them to choose the manner and method by which they will tag or post these prices, so long as when prices are tagged or posted, the consumers will be exposed to the highest price when they see a tagged or posted price." Report at pages 76 and 77. (Emphasis supplied)

Again, it is clear from this language that a "surcharge" exists when the merchant posts only the lower cash price and then surprises the credit card purchaser by charging a higher price than disclosed. Congress acknowledged that there is no difference between a discount and a surcharge so long as full disclosure is made to the consumer of the two-tier pricing structure. NOJC believes that the promulgation of regulations beyond those necessary to ensure full price disclosure to the consumer will have the undesirable effect of removing much of the flexibility which Congress has acknowledged that merchants must have in order to implement successful cash discount programs.

History of Official Staff Commentary on Regulation Z
Section 226.4 (b)(9)-3

In response to NOJC's January 27, 1982 "Request for Issuance of Statement Concerning Practices Authorized under the Cash Discount Act (P. L. 97-25)" the Board published on May 13, 1982 a proposed update to the official Staff Commentary to Regulation Z. A search of the public docket discloses that several comments were received by the Board in response to its proposal. For purposes of this request for determination, the submissions by the Federal Trade Commission (FTC) and NOJC and the Board's response to these submissions in its Final Official Staff interpretation of Regulation Z, Section 226.4 (b)(9)-3 are the most instructive.

By letter dated July 9, 1982 the FTC recommended that the Board's proposal be amended as follows:

> "The 'regular price' is generally the price displayed on the merchandise being sold, if only a single price is displayed. If two prices are displayed on the merchandise, i.e., a cash price (described as such) and a credit card price (described as such) the credit card price is the regular price. However, if only a cash price is displayed on the merchandise, this cash price is the regular price, and if a higher price is charged for credit card use, this higher price is an illegal surcharge. In the sale of motor venicle fuel, the regular (credit card) price should be metered on the pump mechanism." (Emphasis Added)

NOJC's comments, in addition to addressing the issue of whether the cash price could be posted on the pump meter, also criticized the proposal because it appeared to call into question the ability of a retail service station operator to display the cash price only on a pump located at an island dedicated solely to cash sales. Those comments stated --

"Since the latter part of 1981, Board staff has advised NOJC and its member associations that separate cash and credit card islands are acceptable under federal law. Where both credit card sales and cash discount sales are made from the same island, then it would be necessary to post the credit card price at the pump. If an island is dedicated to cash sales, then only the cash price would need to be displayed on the pump meter, these sources stated. Many retail gasoline marketers have altered the manner in which they offer product to conform to this advice. Major refiners who have implemented discount for cash programs across the United States have instructed their dealers to post the cash price on pumps dedicated solely to cash sales.

NOJC believes that as long as the marketer adheres to the proviso that a good faith effort is made to clearly and conspicuously disclose the offered price, it is senseless to require the credit card price to be posted on cash only islands. Such a requirement is unnecessary to protect the consumer and would create substantial administrative burdens for the marketer.

Section 226.4(b)(9) must be supplemented by additional language to ensure consistency with previous Board guidance to permit efficient utilization of islands, and to protect the customer's right to clear and concise price information."

The Federal Reserve Board published its Final Official Staff Interpretation of Regulation Z, Section 226.4(b)(9)-3, in the Federal Register on September 20, 1982 at page 41328. It reads, in part, as follows:

> "Determination of the regular price. The 'regular price' is critical in determining whether the difference between the price charged to cash customers and credit customers is a 'discount' or a 'surcharge,' as these terms are defined in amended section 103 of the act. The 'regular price' is defined in section 103 of the act as the tag or posted price charged for the property or service if a single price is tagged or posted or the price charged for the property or service when payment is made by use of an open-end credit account or a credit card if either (1) no price is tagged or posted, or (2) two prices are tagged or posted. . .For example, in the sale of motor vehicle fuel, the tagged or posted price is the price displayed at the pump. As a result, the higher price (the open-end credit or credit card price) must be displayed at the pump, either alone or along with the cash price. Service station operators may designate separate pumps or separate islands as being either cash or credit purchases and display only the appropriate prices at the various pumps." (Emphasis added)

With the publication of the Final Official Staff Commentary, not only did the Board expressly permit the practice of maintaining separate pumps and islands for cash and credit sales, but also specifically rejected the FTC's recommendation to require the credit price to be posted in the pump meter. In view of the sequence of events and the nature of the many other comments the Board received in support of a flexible price posting approach, there can be no doubt that the Final Official Staff Commentary was intended to give petroleum retail marketers the flexibility to post either the cash or the credit card price in the pump meter, provided that both prices were displayed at the pump.

In applying the Board's guidance on price posting practices, the FTC ruled on December 15, 1982 that Clark Oil's policy of posting the cash price on the pump meter did not violate the law. (Appendix G)

State Statutes, Regulations, and Administrative Rulings

An examination of the New Hampshire and New Jersey statutes, guidelines and administrative rulings clearly discloses a serious and significant interference with the purposes of the TILA, as amended by

the Cash Discount Act. The specific impediments are as follows:

Issue 1:

Is a New Jersey law requiring the meter on a gasoline pump dedicated to cash sales to display the higher credit and price inconsistent with federal law?

Answer: Yes

Section 18: 19-2.7(b) of the New Jersey Administrative Code reads as follows:

> "A retail dealer may sell similar fuels at different prices to cash and credit customers, and the price posted on top of the pump and on the pump meter shall be the credit purchase price. A conspicuous sign shall also be displayed at the pump or at the island posting the price per gallon (or per gallon and per liter) reduction for cash purchases of fuels."

Enforcement guidance issued by New Jersey's Department of Law and Public Safety on February 9, 1983 (New Jersey Enforcement Memo)(Appendix H) to clarify 18:19-2.7(b) NJCA reads as follows:

> "2. separate islands for cash and/or credit may be used provided that the pump posted signs and computer prices on both the cash island and credit card island reflect the higher credit card price."

These directives contradict the Cash Discount Act, as evidenced by the legislative history, and federal law as established by the Board in its September 20, 1982 Commentary, which states in pertinent part: "service station operators may designate pumps or separate islands as being for either cash or credit purchases and display only the appropriate prices at the various pumps." (Emphasis supplied)

Issue 2:

Is a New Jersey law requiring the meter on a gasoline pump used for both cash and credit card sales to display the higher credit card price inconsistent with federal law?

Answer: Yes

Question 2 of this Request for Determination entails an examination of 18:19-2.7(b) NJCA (see previous discussion and Appendix D.) as well as paragraph 1 of New Jersey Enforcement memo, which reads as follows:

> "All gasoline pumps will show the posted price per gallon and/or liter at the higher or credit card price. A sign disclosing the cents-off per gallon discount may be shown

at the pump or at the island site. The lower cash price may be posted on a street sign or some other sign not in close proximity to the pumps themselves. This sign shall be accessible to the public."

These state directives are in conflict with the Cash Discount Act, Congress intent as evidenced by the legislative history, Commentary issued by the Board, and FTC's enforcement ruling in the Clark Oil Case.

Issue 3:

Is a New Hampshire law prohibiting the use of separate islands for cash and credit sales contradictory to federal law?

Answer: Yes.

RSA 339:30-(a)(Supp), as supplemented by the January 24, 1983 ruling by the New Hampshire attorney general provides that it is illegal for a service station to have separate pumps, one for credit cards and one for cash. These directives are inconsistent with the Cash Discount Act, the legislative history, and September 20, 1982 Commentary.

Issue 4:

Is a New Jersey ruling limiting a cash discount to "approximate the economic values to the retailer of providing a discount to his cash customers" (Atty. Gen. F. O. 1982, No. 2)(Appendix F), inconsistent with federal law?

Answer: Yes

In enacting the Cash Discount Act, Congress specifically eliminated the previous 5 percent ceiling on cash discounts. Originally the 5 percent limitation was imposed to ensure that merchants would not recoup more than the economic value of the inherent costs of accepting payment by credit card. In removing the five percent ceiling, it was stated "that if merchants are now permitted to offer discounts of whatever amount they choose, more merchants may offer discounts and the discounts that are offered may be more substantial. <u>This should benefit consumers who pay by cash</u>. (Report at p. 76)

Conclusion

It is evident from the previous discussion of the history of the federal law that Congress had three key issues in mind when it enacted the Cash Discount Act -- full disclosure, elimination of unnecessary and complicated regulatory requirements, and merchant flexibility. NOJC does not believe that Congress considered or could have foreseen that the several states would enact their own regulations, many of which go far beyond the scope of ensuring full disclosure to the consumer, so as to restrict the flexibility of marketers to establish cash discount programs.

Again, one factor that has motivated the states to promulgate restrictive regulations is the confusion surrounding the definition of surcharge. New Jersey and New Hampshire are examples of the many states which have taken a simplistic approach in implementing the prohibition against the imposition of surcharges upon credit card holders by requiring the credit card price to be metered on the pump. The states appear to believe that only in this manner can the service station operator be precluded from tagging or posting only the lower price, and charging the cardholder a higher price than disclosed. However, a much less restrictive way to ensure that the credit card purchaser is not charged a higher price than disclosed is to post the cash price in the meter, while clearly and conspicuously displaying the credit card price on pump toppers at the pump. Such a price posting scheme is presently in place in Arizona (Appendix I) and has been authorized by the FTC pursuant to the Commentary issued by this Board. Such a price posting scheme clearly fulfills the Congressional mandate as found in the Cash Discount Act and accompanying legislative history.

On at least two previous occasions, the Board has responded to specific requests to formally address the issue of whether, in offering a cash discount, a gasoline retailer may set the pump meter at the cash price if the credit card price is also clearly and conspicuously disclosed at the pump. (See NOJC's Request for Interpretation, Appendix J and November 5, 1982 letter from the Department of Justice of the State of Iowa (Appendix K). The Board has continually refused to directly address this issue formally, citing the fact that "Congress wanted to limit regulations to those absolutely necessary to implement the law." (Appendix L). However, Board officials have not hesitated to provide on an informal basis their opinions that such a pricing practice is well within the boundaries of the law, as NOJC and the Texas Oil Marketers Association have both reported (See Appendix J, and Texas Oil Marketers Association, November 16, 1981 Marketers Report, Appendix M.)

By failing to act to endorse the most flexible approach to price posting at gasoline service stations under the Cash Discount Act, the Board actually has encouraged the promulgation of a myriad of restrictive state regulations which will have the effect of discouraging the offering of cash discounts for gasoline nationwide. The net result of the Board's abdication of its regulatory responsibilities under the TILA on this issue is a plethora of complicated regulations, the exact opposite of what Congress intended.

The gasoline marketing segment of the petroleum industry appears to be the only area of the marketplace in which cash discounts are being offered on a large scale. Thus, some would argue that the restrictions imposed by the states have not been a significant factor in discouraging marketers from offering cash discounts. However, marketers are becoming increasingly disillusioned with both the economic impact of cash discounts (see Appendix N) as well as with the burdens imposed upon them by state regulatory bodies. Many marketers persist in maintaining their programs because they are forced to do so for competitive reasons. However, the regulatory environment nationwide is not conducive to the continuation of cash discounts for gasoline on a long term basis. They will die on a a large scale at the first opportunity, unless these regulatory burdens are lifted.

There can be no doubt that the New Hampshire and New Jersey statutes, guidelines and rulings presented herein represent both a significant impediment to the operation of the TILA, as amended, and a serious interference with the purposes of the TILA, as evidenced by the legislative history of the Cash Discount Act. Consistent with Congress intent and in the public interest, the NOJC urges the Board to grant NOJC's request that these statutes, guidelines and rulings be determined to be inconsistent with federal law.

Attachment 3 APPENDIX A

Note 21

21. Violations within subchapter

Obligation of the lender under this subchapter is to properly disclose; this subchapter does not concern itself with subsequent performance of the credit transaction. Fenton v. Citizens Sav. Ass'n, D.C.Mo.1975, 400 F.Supp. 874.

Evil addressed by this subchapter is only consumer loan transactions. Toy Nat. Bank of Sioux City v. McGarr, Iowa 1979, 286 N.W.2d 376.

Examples of situations which this subchapter was designed to address are personal loans made by a consumer finance company or bank, retail installment sales from a department store or auto dealer, and sales or loans made pursuant to a credit card. Rogers Mortuary, Inc. v. White, 1979, 594 P.2d 351, 92 N.M. 691.

Nothing in this subchapter prohibits parties from mutually agreeing to pay or receive money under payroll deduction plan. Reese v. Robins Federal Credit Union, 1979, 256 S.E.2d 604, 150 Ga.App. 1.

§ 1602. Definitions and rules of construction

(a) The definitions and rules of construction set forth in this section are applicable for the purposes of this subchapter.

(b) The term "Board" refers to the Board of Governors of the Federal Reserve System.

(c) The term "organization" means a corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative, or association.

(d) The term "person" means a natural person or an organization.

(e) The term "credit" means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

(f) The term "creditor" refers only to a person who both (1) regularly extends, whether in connection with loans, sales of property or services, or otherwise, consumer credit which is payable by agreeement in more than four installments or for which the payment of a finance charge is or may be required; and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness or, if there is no such evidence of indebtedness, by agreement. Notwithstanding the previous sentence, a person who regularly arranges for the extension of consumer credit, which is payable in more than four installments or for which the payment of a finance charge is or may be required, from persons who are not creditors is a creditor, and in the case of an open end credit plan involving a credit card, the card issuer and any person who honors the credit card and offers a discount which is a finance charge are creditors. For the purposes of the requirements imposed under Part D of this subchapter and sections 1637(a)(5), 1637(a)(6), 1637(a)(7), 1637(b)(1), 1637(b)(2), 1637(b)(3), 1637(b)(8), and 1637(b)(10) of this title, the term "creditor" shall also include card issuers whether or not the amount due is payable by agreement in more than four installments or the payment of a finance charge is or may be required, and the Board shall, by regulation, apply these requirements to such card issuers, to the extent appropriate, even though the requirements are by their terms applicable only to creditors offering open end credit plans. The provisions of this subchapter apply to any such creditor, irrespective of his or its status as a natural person or any type of organization.

(g) The term "credit sale" refers to any sale in which the seller is a creditor. The term includes any contract in the form of a bailment or lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property and services involved and it is agreed that the bailee or lessee will become, or for no other or a nominal consideration has the option to become, the owner of the property upon full compliance with his obligations under the contract.

(h) The adjective "consumer", used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family, or household purposes.

(i) The term "open end credit plan" means a plan under which the creditor reasonably contemplates repeated transactions, which prescribes the terms of such transactions, and which provides for a finance charge which may be computed from time to time on the outstanding unpaid balance. A credit plan which is an open end credit plan within the meaning of the preceding sentence is an open end credit plan even if credit information is verified from time to time.

(j) The term "adequate notice", as used in section 1643 of this title, means a printed notice to a cardholder which sets forth the pertinent facts clearly and conspicuously so that a person against whom it is to operate could reasonably be expected to have noticed it and understood its meaning. Such notice may be given to a cardholder by printing the notice on any credit card, or on each periodic statement of account, issued to the cardholder, or by any other means reasonably assuring the receipt thereof by the cardholder.

(k) The term "credit card" means any card, plate, coupon book or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.

(l) The term "accepted credit card" means any credit card which the cardholder has requested and received or has signed or has used, or authorized another to use, for the purpose of obtaining money, property, labor, or services on credit.

(m) The term "cardholder" means any person to whom a credit card is issued or any person who has agreed with the card issuer to pay obligations arising from the issuance of a credit card to another person.

(n) The term "card issuer" means any person who issues a credit card, or the agent of such person with respect to such card.

(o) The term "unauthorized use", as used in section 1643 of this title, means a use of a credit card by a person other than the cardholder who does not have actual, implied, or apparent authority for such use and from which the cardholder receives no benefit.

(p) The term "discount" as used in section 1666f of this title means a reduction made from the regular price. The term "discount" as used in section 1666f of this title shall not mean a surcharge.

(q) The term "surcharge" as used in this section and section 1666f of this title means any means of increasing the regular price to a cardholder which is not imposed upon customers paying by cash, check, or similar means.

(r) The term "State" refers to any State, the Commonwealth of Puerto Rico, the District of Columbia, and any territory or possession of the United States.

(s) The term "agricultural purposes" includes the production, harvest, exhibition, marketing, transportation, processing, or manufacture of agricultural products by a natural person who cultivates, plants, propagates, or nurtures those agricultural products, including but not limited to the acquisition of farmland, real property with a farm residence, and personal property and services used primarily in farming.

(t) The term "agricultural products" includes agricultural, horticultural, viticultural, and dairy products, livestock, wildlife, poultry, bees, forest products, fish and shellfish, and any products thereof, including processed and manufactured products, and any and all products raised or produced on farms and any processed or manufactured products thereof.

(u) The term "material disclosures" means the disclosure, as required by this subchapter, of the annual percentage rate, the method of determining the finance charge and the balance upon which a finance charge will be imposed, the amount of the finance charge, the amount to be financed, the total of payments, the number and amount of payments, and the due dates or periods of payments scheduled to repay the indebtedness.

(v) The term "dwelling" means a residential structure or mobile home which contains one to four family housing units, or individual units of condominiums or cooperatives.

(w) The term "residential mortgage transaction" means a transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained against the consumer's dwelling to finance the acquisition or initial construction of such dwelling.

(x) As used in this section and section 1666f of this title, the term "regular price" means the tag or posted price charged for the property or service if a single price is tagged or posted, or the price charged for the property or service when payment is made by use of an open-end credit plan or a credit card if either (1) no price is tagged or posted, or (2) two prices are tagged or posted, one of which is charged when payment is made by use of an open-end credit plan or a credit card and the other when payment is made by the use of cash, check, or similar means. For purposes of this definition, payment by check, draft, or other negotiable instrument which may result in the debiting of an open-end credit plan or a credit cardholder's open-end account shall not be considered payment made by use of the plan or the account.

(y) Any reference to any requirement imposed under this subchapter or any provision thereof includes reference to the regulations of the Board under this subchapter or the provision thereof in question.

(z) The disclosure of an amount or percentage which is greater than the amount or percentage required to be disclosed under this subchapter does not in itself constitute a violation of this subchapter.

(Pub.L. 90–321, Title I, § 103, May 29, 1968, 82 Stat. 147; Pub.L. 91–508, Title V, § 501, Oct. 26, 1970, 84 Stat. 1126; Pub.L. 93–495, Title III, § 303, Oct. 28, 1974, 88 Stat. 1511; Pub.L. 94–222, § 3(a), Feb. 27, 1976, 90 Stat. 197; Pub.L. 96–221, Title VI, §§ 602, 603(a), (b), 604, 612(a)(2), (b), Mar. 31, 1980, 94 Stat. 168, 169, 175, 176; Pub.L. 97–25, Title I, § 102, July 27, 1981, 95 Stat. 144.)

Text of Section Effective Until October 1, 1982

Prior to its amendment by Pub.L. 96–221, effective upon the expiration of two years and six months after March 31, 1980, and by section 102(b) of Pub.L. 97–25, effective April 10, 1982 this section read as follows:

(a) The definitions and rules of construction set forth in this section are applicable for the purposes of this subchapter.

(b) The term "Board" refers to the Board of Governors of the Federal Reserve System.

(c) The term "organization" means a corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative, or association.

(d) The term "person" means a natural person or an organization.

(e) The term "credit" means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

(f) The term "creditor" refers only to creditors who regularly extend, or arrange for the extension of, credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, whether in connection with loans, sales of property or services, or otherwise. For the purposes of the requirements imposed under Part D of this subchapter and sections 1637(a)(6), 1637(a)(7), 1637(a)(8), 1637(b)(1), 1637(b)(2), 1637(b)(3), 1637(b)(9), and 1637(b)(11) of this title, the term "creditor" shall also include card issuers whether or not the amount due is payable by agreement in more than four installments or the payment of a finance charge is or may be required, and the Board shall, by regulation, apply these requirements to such card issuers, to the extent appropriate, even though the requirements are by their terms applicable only to creditors offering open end credit plans. The provisions of this subchapter apply to any such creditor, irrespective of his or its status as a natural person or any type of organization.

(g) The term "credit sale" refers to any sale with respect to which credit is extended or arranged by the seller. The term includes any contract in the form of a bailment or lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property and services involved and it is agreed that the bailee or lessee will become, or for no other or a nominal consideration has the option to become, the owner of the property upon full compliance with his obligations under the contract.

(h) The adjective "consumer", used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family, household, or agricultural purposes.

(i) The term "open end credit plan" refers to a plan prescribing the terms of credit transactions which may be made thereunder from time to time and under the terms of which a finance charge may be computed on the outstanding unpaid balance from time to time thereunder.

(j) The term "adequate notice", as used in section 1643 of this title, means a printed notice to a cardholder which sets forth the pertinent facts clearly and conspicuously so that a person against whom it is to operate could reasonably be expected to have noticed it and understood its meaning. Such notice may be given to a cardholder by printing the notice on any credit card, or on each periodic statement of account, issued to the cardholder, or by any other means reasonably assuring the receipt thereof by the cardholder.

(k) The term "credit card" means any card, plate, coupon book or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.

(l) The term "accepted credit card" means any credit card which the cardholder has requested and received or has signed or has used, or authorized another to use, for the purpose of obtaining money, property, labor, or services on credit.

(m) The term "cardholder" means any person to whom a credit card is issued or any person who has agreed with the card issuer to pay obligations arising from the issuance of a credit card to another person.

(n) The term "card issuer" means any person who issues a credit card, or the agent of such person with respect to such card.

Truth In Lending Regulations

Closed-end credit plans, see § 226.21, set out following section 1700 of this title.
Open-end credit plans, see § 226.11.

Library References

Consumer Credit ⟸30, 32

C.J.S. Interest and Usury; Consumer Credit § 318.

§ 1666e. Notification of credit card issuer by seller of return of goods, etc., by obligor; credit for account of obligor

With respect to any sales transaction where a credit card has been used to obtain credit, where the seller is a person other than the card issuer, and where the seller accepts or allows a return of the goods or forgiveness of a debit for services which were the subject of such sale, the seller shall promptly transmit to the credit card issuer, a credit statement with respect thereto and the credit card issuer shall credit the account of the obligor for the amount of the transaction.

(Pub.L. 90–321, Title I, § 166, as added Pub.L. 93–495, Title III, § 306, Oct. 28, 1974, 88 Stat. 1514.)

Historical Note

Effective Date. Section effective upon the expiration of one year after Oct. 28, 1974, see section 308 of Pub.L. 93–495, set out as an Effective Date note under section 1666 of this title.

Legislative History. For legislative history and purpose of Pub.L. 93–495, see 1974 U.S. Code Cong. and Adm.News, p. 6119.

Truth In Lending Regulations

Additional requirements, see § 226.12(e), set out following section 1700 of this title.

§ 1666f. Inducements to cardholders by sellers of cash discounts for payments by cash, check or similar means; credit card surcharge prohibition; finance charge for sales transactions involving cash discounts

(a)(1) With respect to credit card which may be used for extensions of credit in sales transactions in which the seller is a person other than the card issuer, the card issuer may not, by contract or otherwise, prohibit any such seller from offering a discount to a cardholder to induce the cardholder to pay by cash, check, or similar means rather than use a credit card.

(2) No seller in any sales transaction may impose a surcharge on a cardholder who elects to use a credit card in lieu of payment by cash, check, or similar means.

(b) With respect to any sales transaction, any discount from the regular price offered by the seller for the purpose of inducing payment by cash, checks, or other means not involving the use of an open-end credit plan or a credit card shall not constitute a finance charge as determined under section

1605 of this title if such discount is offered to all prospective buyers and its availability is disclosed clearly and conspicuously.

(Pub.L. 90–321, Title I, § 167, as added Pub.L. 93–495, Title III, § 306, Oct. 28, 1974, 88 Stat. 1515, and amended Pub.L. 94–222, § 3(c)(1), Feb. 27, 1976, 90 Stat. 197; Pub.L. 97–25, Title I, § 101, July 27, 1981, 95 Stat. 144.)

Historical Note

1981 Amendment. Subsec. (b). Pub.L. 97–25 substituted "With respect to any sales transaction, any discount from the regular price offered by the seller for the purpose of inducing payment by cash, checks, or other means not involving the use of an open-end credit plan or a credit card shall not constitute a finance charge as determined under section 1605 of this title if such discount is offered to all prospective buyers and its availability is disclosed clearly and conspicuously" for "With respect to any sales transaction, any discount not in excess of 5 per centum offered by the seller for the purpose of inducing payment by cash, check, or other means not involving the use of a credit card shall not constitute a finance charge as determined under section 1605 of this title, if such discount is offered to all prospective buyers and its availability is disclosed to all prospective buyers clearly and conspicuously in accordance with regulations of the Board".

1976 Amendment. Subsec. (a). Pub.L. 94–222 designated existing provisions as par. (1) and added par. (2).

Termination Date of 1976 Amendment. Section 3(c)(2) of Pub.L. 94–222 as amended Pub.L. 95–630, Title XV, § 1501, Nov. 10, 1978, 92 Stat. 3713; Pub.L. 97–25, Title II, § 201, July 27, 1981, 95 Stat. 144, provided that: "The amendments made by paragraph (1) [amending subsec. (a) of this section] shall cease to be effective on February 27, 1984."

Effective Date. Section effective upon the expiration of one year after Oct. 28, 1974, see section 308 of Pub.L. 93–495, set out as a note under section 1666 of this title.

Nullification of Board Rules and Regulations Under Subsection (b) of this Section in Effect on July 26, 1981. Section 103 of Pub. L. 97–25 provided that: "Any rule or regulation of the Board of Governors of the Federal Reserve System pursuant to section 167(b) of the Truth in Lending Act [subsec. (b) of this section], as such section was in effect on the day before the date of enactment of this Act [July 27, 1981], is null and void."

Legislative History. For legislative history and purpose of Pub.L. 93–495, see 1974 U.S. Code Cong. and Adm.News, p. 6119. See, also, Pub.L. 94–222, 1976 U.S.Code Cong. and Adm.News, p. 287; Pub.L. 97–25, 1981 U.S.Code Cong. and Adm.News, p. 74.

Truth In Lending Regulations

Discounts, see § 226.12(f)(1), set out following section 1700 of this title.

Library References

Consumer Credit ⇐8

C.J.S. Interest and Usury; Consumer Credit § 348.

§ 1666g. Tie-in services prohibited for issuance of credit card

Notwithstanding any agreement to the contrary, a card issuer may not require a seller, as a condition to participating in a credit card plan, to open an account with or procure any other service from the card issuer or its subsidiary or agent.

(Pub.L. 90–321, Title I, § 168, as added Pub.L. 93–495, Title III, § 306, Oct. 28, 1974, 88 Stat. 1515.)

Historical Note

Effective Date. Section effective upon the expiration of one year after Oct. 28, 1974, see section 308 of Pub.L. 93–495, set out as an Effective Date note under section 1666 of this title.

(Supplement I to Part 226) read as follows:

Supplement I—Official Staff Commentary—TIL-1

Introduction

* * * * *

3. *Status of previous interpretations.* All statements and opinions issued by the Federal Reserve Board and its staff interpreting previous Regulation Z remain effective until October 1, 1982, only insofar as they interpret that regulation. When compliance with revised Regulation Z becomes mandatory on October 1, 1982, the Board and staff interpretations of the previous regulation will be entirely superseded by the revised regulation and this commentary except with regard to liability under the previous regulation." * *

Subpart A—General

Section 226.2—Definitions and Rules of Construction

2(a) Definitions. * * *

2(a)(3) "Arranger of Credit". * * *

1. *Coverage.* * * *

6. *Real estate brokers.* The general definition does not include a person (such as a real estate broker or salesperson) who, as part of the process of arranging the sale of real property or a dwelling, arranges for the seller to totally or partly finance the purchase, even if the obligation by its terms is simultaneously assigned by the seller to another person. However, a broker or salesperson is not exempt from coverage in all transactions. For example, a real estate broker may be a creditor in the following situations:

- The broker acts as a loan broker to arrange for someone other than the seller to extend credit, provided that the extender of credit (the person to whom the obligation is initially payable) does not meet the "creditor" definition.
- The broker extends credit itself, provided that the broker otherwise meets the "creditor" definition." * *

2(c)(13) "Consummation".

1. *State law governs.* When a contractual obligation on the consumer's part is created is a matter to be determined under applicable law; Regulation Z does not make this determination. A contractual commitment agreement, for example, that under applicable law binds the consumer to the credit terms would be consummation. Consummation, however, does not occur merely because the consumer has made some financial investment in the transaction (for example, by paying a nonrefundable fee) unless, of course, applicable law holds otherwise. * * *

2(a)(23) "Prepaid Finance Charge". * * *

2. *Examples.* Common examples of prepaid finance charges include:

- Buyer's points.
- Service fees.
- Loan fees.
- Finder's fees.
- Loan guarantee insurance.
- Credit investigation fees.

However, in order for these or any other finance charges to be considered prepaid, they must be either paid separately in cash or check or withheld from the proceeds. Prepaid finance charges include any portion of the finance charge paid prior to or at closing or settlement. * * *

2(a)(24) "Residential Mortgage Transaction".

1. *Relation to other sections.* This term is important in six provisions in the regulation:

- Section 226.4(c)(7)—exclusions from the finance charge.
- Section 226.15(f)—exemption from the right of rescission.
- Section 226.18(q)—whether or not the obligation is assumable.
- Section 226.19—special timing rules.
- Section 226.20(b)—disclosure requirements for assumptions.
- Section 226.23(f)—exemption from the right of rescission. * * *

2(a)(25) "Security Interest".

1. *Threshold test.* The threshold test is whether a particular interest in property is recognized as a security interest under applicable law. The regulation does not determine whether a particular interest is a security interest under applicable law. If the creditor is unsure whether a particular interest is a security interest under applicable law (for example, if statutes and case law are either silent or inconclusive on the issue), the creditor may at its option consider such interests as security interests for Truth in Lending purposes. However, the regulation and the commentary do exclude specific interests, such as after-acquired property and accessories, from the scope of the definition regardless of their categorization under applicable law, and these named exclusions may not be disclosed as security interests under the regulation. (But see the discussion of exclusions elsewhere in the commentary to § 226.2(a)(25).)

2. *Exclusions.* The general definition of security interest excludes three groups of interests: incidental interests, interests in after-acquired property, and interests that arise solely by operation of law. These interests may not be disclosed with the disclosures required under § 226.18, but the creditor is not precluded from preserving these rights elsewhere in the contract documents, or invoking and enforcing such rights, if it is otherwise lawful to do so. If the creditor is unsure whether a particular interest is one of the excluded interests, the creditor may, at its option, consider such interests as security interests for Truth in Lending purposes. * * *

Section 226.4—Finance Charge

* * * * *

4(b) Examples of Finance Charge. * * *

Paragraph 4(b)(9). * * *

3. *Determination of the regular price.* The "regular price" is critical in determining whether the difference between the price charged to cash customers and credit customers is a "discount" or a "surcharge," as these terms are defined in amended section 103 of the act. The "regular price" is defined in section 103 of the act as "the tag or posted price charged for the property or service if a single price is tagged or posted, or the price charged for the property or service when payment is made by use of an open-end credit account or a credit card if either (1) no price is tagged or posted, or (2) two prices are tagged or posted. . . ." For example, in the sale of motor vehicle fuel, the tagged or posted price is the price displayed at the pump. As a result, the higher price (the open-end credit or credit card price) must be displayed at the pump, either alone or along with the cash price. Service station operators may designate separate pumps or separate islands as being for either cash or credit purchases and display only the appropriate prices at the various pumps. If a pump is capable of displaying on its meter either a cash or a credit price depending upon the consumer's means of payment, both the cash price and the credit price must be displayed at the pump. A service station operator may display the cash price of fuel by itself on a curb sign, as long as the sign clearly indicates that the price is limited to cash purchases. * * *

4(c) Charges Excluded from the Finance Charge. * * *

Paragraph 4(c)(7).

1. *Real estate or residential mortgage transaction charges.* The list of charges in § 226.4(c)(7) applies both to residential mortgage transactions (which may include, for example, the purchase of a mobile home) and to other transactions secured by real estate. The fees are excluded from the finance charge even if the services for which the fees are imposed are performed by the

APPENDIX D

NEW JERSEY ADMINISTRATIVE CODE

CITE
N.J.A.C. 18:19-2.1

Statutory Reference

N.J.S.A. 56:6–1.

"Retail dealer" means any person operating a service station, filling station, store, garage or other place of business for the sale of motor fuel, for delivery into the service tank or tanks of any vehicle propelled by an internal combustion engine.

Statutory Reference

N.J.S.A. 56:6–1.

"Sale" shall have its ordinary meaning and, in addition, shall include any exchange, gift, theft, or other disposition.

Statutory Reference

N.J.S.A. 56:6–1.

"Selling expense" means and includes all overhead and general business expense.

Statutory Reference

N.J.S.A. 56:6–1.

IMPORTANT

SEE ATTACHED AMENDMENTS

SUBCHAPTER 2. POSTED PRICES; ADVERTISING; REBATES; ALLOWANCES AND PRIZES; TRADE MARKS

18:19–2.1 Posted price signs

(a) All signs relating to the price of motor fuel being sold or dispensed by a retail dealer must be used and displayed in accordance with the provisions of these regulations.

(b) Signs, stating the price of motor fuel for delivery into the service tank or tanks of any vehicle propelled by an internal combustion engine, must be displayed and maintained on each pump or other dispensing equipment from which motor fuel is sold.

(c) No retail dealer shall sell or offer for sale any motor fuel without having attached by a suitable bracket or slot arrangement to each pump or other dispensing equipment from which motor fuel is sold or offered for sale a weather-proof case not less than 5½ inches by eight inches and not more

than eight inches by ten inches, on both sides of which will be displayed a card insert price sign not less than five inches by 7½ inches and not more than 7½ inches by nine inches, stating the price per gallon at which motor fuel may be purchased from such pumps or other dispensing equipment.

1. The price signs shall show only the unit price per gallon;

2. Such unit price includes all taxes imposed, whether state or Federal. Beneath the unit price there shall be either the statement:

i. "Includes.. (insert the tax per gallon)..N.J. Tax.. (insert tax per gallon)..Federal Tax;"

ii. "Includes State and Federal Taxes;"

iii. "Includes N. J. and U. S. Taxes;"

iv. "Includes all Taxes."

(d) *Size of whole numbers, fractions.*

1. The whole numbers in the unit price of the price sign must be at least 3½ inches high;

2. When a fraction is part of the unit price, the figures in the numerator and denominator must be at least 1½ inches high and the total size including the numerator, the line dividing the numerator and denominator, and the denominator must be at least 3½ inches high;

3. As a substitute for the fraction there may be used only the numerator of the fraction, in which case, the numerator figure must be ½ the size of those in the whole number;

4. The statement that all taxes are included shall be in letters at least ⅜ of an inch high.

5. The colors of all price signs shall be of such combination that the sign may be easily read by any person purchasing motor fuel from the pump or other dispensing equipment to which the sign is attached;

6. Any figure or fraction used in any price computing mechanism constituting a part of a computing pump, or any other dispensing equipment shall not be considered a price sign under the provisions of the section.

Statutory Reference

N.J.S.A. 56:6–2.3

18:19–2.2 Special conditions for price signs

(a) Price signs required to be used and displayed by motor fuel retail dealers on pumps or other dispensing equipment from which motor fuel is

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sold or offered for sale must be attached by means of a bracket or slot arrangement to the top or side of such pumps or other dispensing equipment so that the signs are readily visible to the purchaser.

(b) Waterproof case location rules are:

1. If such signs are placed on the top of a pump, the top of the waterproof case (size not less than 5½ inches x 8 inches and not more than 8 inches x 10 inches must not be more than 14 inches above the top of such pump or other dispensing equipment;

2. If the sign is placed on the side of a pump, the bracket or slot arrangement must be attached in the upper quarter (approximately) of the side of the pump or other dispensing equipment in such a manner that the outer edge of the waterproof case is no more than 16 inches from the side of such pump or other dispensing equipment.

(c) Any Motor Fuel Retail Dealer possessing built-in masonry or blending pumps, or other similar devices of such construction or operation which prohibits the attachment of the price sign in the manner or of the type set forth in these regulations must seek instruction from the Division of Taxation.

Historical Note

Formerly RC-1, filed 5/29/52.

Statutory Reference

N.J.S.A. 56:6–2.3.

18:19–2.3 Rebate of allowances, lotteries and games of chance

(a) A retail dealer must not sell motor fuel at any other price than the price, including tax, so posted. Any such price when posted shall remain posted and in effect for a period of not less than 24 hours.

(b) No retail dealer shall sell motor fuel at a price which is below the net cost of such motor fuel to the retail dealer plus all selling expenses.

(c) No rebates, allowance, concessions or benefits may be given, directly or indirectly, so as to permit any person to obtain motor fuel from a retail dealer below the posted price or at a net price lower than the posted price applicable at the time of the sale.

(d) It is unlawful for any retail dealer to use lotteries, prizes, wheels of fortune, punch-boards or other games of chance, in connection with the sale of motor fuels.

Statutory Reference

N.J.S.A. 56:6–2.

18:19–2.4 Brand names and trade names displayed

(a) *Conspicuous display.*

1. All above-ground equipment for storing or dispensing motor fuel operated by a retail dealer must bear, in a conspicuous place, the name or trade mark of the product stored therein or dispensed therefrom.

2. No retail dealer may permit delivery into underground or above-ground containers, tanks or equipment of any motor fuel other than the brand represented or designated by the name or trade-mark appearing on such container or dispensing equipment attached thereto.

(b) *Visible to customers.*

1. The brand name or trade-mark must be placed in such a position on the pump that it will be readily visible to customers approaching such pump;

2. The letters and numerals included in such brand name or trade-mark must be of such a size that they will be readily readable by a customer approaching the pump.

(c) Brand names and trade-marks must be displayed through the medium of glass globes, display panels, decalcomania, paint application, or similar permanent devices on the pump.

(d) If the motor fuel stored in or dispensed from any above-ground equipment by a retail dealer does not have a brand name or trade-mark, the container or dispensing equipment must have, conspicuously displayed thereon the words "No Brand"

Historical Note

Formerly Reg. RC-2, filed 1/1/48.

Statutory Reference

N.J.S.A. 56:6–2.

18:19–2.5 Substitution of fuels prohibited

No retail dealer shall be a party to the substitution of one grade of motor fuel for another.

Statutory Reference

N.J.S.A. 56:6–2.

18:19–2.6 Other advertising requirements

(a) Any advertising of the retail price of motor fuel through any other medium which contains a reference to the per gallon price thereof, must include all taxes in the price stated, and there must be included in such advertising a statement that such price includes taxes, or a statement of the amount of taxes which are included in such price.

(b) Such advertising must be identified by the name of the product, and the letters of the name shall be not less than one-half the size of the figures used in the price.

Statutory Reference

N.J.S.A. 56:6–2.

18:19–2.7 Posted prices and brand names applied uniformly

The provisions of Sections 2.1–2.5 of this Chapter as they relate to posted prices and brand names are deemed to apply in a uniform and consistent manner to each motor fuel product as such products are identified by the supplier's invoice at the time of the purchase.

Example:

All gasoline purchased as XYZ Regular will be dispensed from equipment bearing one uniform price and one uniform brand name or, as required, labeled "No Brand".

All motor fuels designated "Housebrand" by the supplier will be treated in like manner.

Statutory Reference

N.J.S.A. 56:6–2.

18:19–2.8 Gifts with fuel purchases

(a) No motor fuel retail dealer shall give away anything of value when such "give-away" is conditioned upon the purchase of motor fuel and would have the tendency to produce sharp and drastic price reductions, create price wars or foster price instability throughout the industry.

(b) Any such "give-away" in connection with so-called anniversaries, grand openings, or similar occasions is prohibited.

Historical Note

Formerly RC–4, filed 5/11/61.

Statutory Reference

N.J.S.A. 56:6–2.

18:19–2.9 "Retail" fixed location sales

(a) "Retail" sales are sales made from a fixed place of business directly into the fuel tank or tanks of the motor vehicles that consume the fuel.

(b) Sales may be made directly into the fuel tanks of motor boats only from a fixed location properly covered by a Retail Dealer's License in the name of the seller.

1. This fixed location may be equipped either with permanent or temporary installations for the dispensing of fuels directly into the fuel tank of boats;

2. A tank truck cannot, under any circumstances, be licensed as a fixed place of business, although it may be part of a temporary dispensing equipment used at a fixed location.

Historical Note

Formerly M.F.–12, filed 1/1/48.

Statutory Reference

N.J.S.A. 56:6–1.

18:19–2.10 Reserved

18:19–2.11 Reserved

LATE FILINGS

TREASURY–TAXATION

(a)

DIVISION OF TAXATION

Motor Fuels Tax
Retail Sales of Motor Fuels: Gallon and Liter Conversions

Proposed Amendments: N.J.A.C. 18:19-1.1, 2.1, 2.2, 2.6 and 3.1
Proposed New Rules: N.J.A.C. 18:19-2.10 and 18:19-3.3

Authorized By: Sidney Glaser, Director of the Division of Taxation.
Authority: N.J.S.A. 56:6-6 and P.L. 1981, c.230, sec 4.

The agency proposal follows:

Summary

The proposed rules, pursuant to P.L. 1981, c.230, provide for larger mandatory price signs attached to retail motor fuels pumps which shall be able to accommodate signs with both the price per gallon and the price per liter. The proposed rules also permit other signs to be used in addition to the pump signs.

Social Impact

The proposed rules will affect motor fuels retail purchasers and retail dealers in the State of New Jersey. The proposed rules clarify the manner used by motor fuels sellers at retail to employ metric measurements and prices per liter. By enabling the posting of signs away from fuel pumps, the proposed rules afford the general public a better means of seeing the pricing used by retail dealers.

Economic Impact

The proposed rules have no economic impact upon the purchasing public or upon retail dealers of motor fuels who wish to continue their current practice of posting prices per gallon. They do permit the use of larger signs by those who wish to sell motor fuels by the liter. The proposed rules enable retail dealers to price the sale of motor fuels to the public in either price per gallon or price per liter.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]).

18:19-1.1 Words and phrases defined

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise:

"Director" means ....
[Statutory Reference N.J.S.A. 56:6-1]
"Motor Fuel" means ....
[Statutory Reference N.J.S.A. 56:6-1]
"Person" means ....
[Statutory Reference N.J.S.A. 56:6-1]
"Purchase" ....
[Statutory Reference N.J.S.A. 56:6-1]
"Retail dealer" means ....
[Statutory Reference N.J.S.A. 56:6-1]
"Sale" means ....
[Statutory Reference N.J.S.A. 56:6-1]
"Selling expense" means ....
[Statutory Reference N.J.S.A. 56:6-1]

"Superintendent" means the State Superintendent of Weights and Measures. The term may also include any State, county, or municipal weights and measures officer.

18:19-2.1 Posted price signs

(a)–(b) (No change.)

(c) No retail dealer shall sell or offer for sale any motor fuel without having attached by a suitable bracket or slot arrangement to each pump or other dispensing equipment from which motor fuel is sold or offered for sale a weather-proof case not less than 5 1/2 inches by eight inches and not more than [eight] **12** inches by [ten] 12 inches, on both sides of which will be displayed a card insert price sign not less than five inches by 7 1/2 inches and not more than [7 1/2] **11 1/2** inches by [nine] **11 1/2** inches, stating the price per gallon **if sold by the gallon, and per gallon and per liter if sold by the liter** at which motor fuel may be purchased from such pumps or other dispensing equipment.

1. [The price signs shall show only the unit price per gallon.] **Data to be shown on price signs:**

i. The price signs shall show the unit price per gallon if the fuel is sold by the gallon;

ii. If the fuel is sold per liter, the sign shall show the unit price per gallon and the unit price per liter. The price per gallon shall be located on the top half of the sign and the price per liter shall be located on the bottom half of the sign on differing background colors such as black and white;

iii. Such signs shall show no other data than the data required by (c) of this section.

2. (No change.)

3. The size of the whole numbers and fractions which are a part of the price sign must be of such a size that they will be readily readable by a customer approaching the pump.

[(d) Size of whole numbers, fractions.

1. The whole numbers in the unit price of the price sign must be at least 3 1/2 inches high;

2. When a fraction is part of the unit price, the figures in the numerator and denominator must be at least 1 1/2 inches high and the total size including the numerator, the line dividing the numerator and denominator, and the denominator must be at least 3 1/2 inches high;

3. As a substitute for the fraction there may be used only the numerator of the fraction, in which case, the numerator figure must be 1/2 the size of those in the whole number;]

Renumber (d)4.–6. as (c)4.–6.

18:19-2.2 Special conditions for price signs

(a) (No change.)

(b) Waterproof case location rules are:

1. If such signs are placed on the top of a pump, the top of the waterproof case (size not less than 5 1/2 inches by 8 inches and not more than [8] 12 inches by [10] 12 inches) must not be more than 14 inches above the top of such pump or other dispensing equipment.

2. (No change.)

(c) (No change.)

(d) In addition to the signs required by this chapter, a Motor Fuel Retail Dealer may install

sized signs referring to the per gallon or per gallon and per liter price of motor fuels. Such signs shall permit a member of the public to see readily the price of fuels as he drives into the station.

18:19-2.6 Other advertising requirements

(a) Any advertising of the retail price of motor fuel through any other medium which contains a reference to the per gallon price or the per liter and per gallon price thereof, must include all taxes in the price stated, and there must be included in such advertising a statement that such price includes taxes, or a statement of the amount of taxes which are included in such price.

(b) (No change.)

18:19-2.10 Conversion tables

(a) The following formula is designed to assist the purchaser of motor fuels in converting liters to approximately equivalent gallons or determine tank capacity in liters:

3.785 liters 1 gallon
1 liter 0.2642 gallon.
If greater precision is needed
3.78541 liters 1 gallon
1 liter 0.264172 gallon.

1. The following table will help convert liters to approximately equivalent gallons or find tank capacity in liters:

Liters	Gallons	Liters	Gallons
1	0.26	50	13.2
4	1.1	55	14.5
10	2.6	57	15.0
15	4.0	60	15.9
19	5.0	65	17.2
20	5.3	70	18.5
25	6.6	75	19.8
30	7.9	80	21.1
35	9.2	85	22.5
38	10.0	90	23.8
40	10.6	95	25.1
45	11.9	100	26.4

2. On the following approximate price comparison chart the gallon price equivalents are rounded to the nearest penny.

Price per liter	Price per gallon	Price per liter	Price per gallon
$0.28	$1.06	.44	1.67
.29	1.10	.45	1.70
.30	1.14	.46	1.74
.31	1.17	.47	1.78
.32	1.21	.48	1.82
.33	1.25	.49	1.85
.34	1.29	.50	1.89
.35	1.32	.51	1.93
.36	1.36	.52	1.97
.37	1.40	.53	2.01
.38	1.44	.54	2.04
.39	1.48	.55	2.08
.40	1.51	.56	2.12
.41	1.55	.57	2.16
.42	1.59	.58	2.20
.43	1.63		

3. The State of New Jersey Official price per liter to price per gallon conversion chart follows:

Price per liter cents	Price per gallon cents	Price per liter cents	Price per gallon cents	Price per liter cents	Price per gallon cents
30.9	117.0	33.7	127.6	36.5	138.2
31.0	117.3	33.8	127.9	36.6	138.5
31.1	117.7	33.9	128.3	36.7	138.9
31.2	118.1	34.0	128.7	36.8	139.3
31.3	118.5	34.1	129.1	36.9	139.7
31.4	118.9	34.2	129.5	37.0	140.1
31.5	119.2	34.3	129.8	37.1	140.4
31.6	119.6	34.4	130.2	37.2	140.8
31.7	120.0	34.5	130.6	37.3	141.2
31.8	120.4	34.6	131.0	37.4	141.6
31.9	120.8	34.7	131.4	37.5	142.0
32.0	121.1	34.8	131.7	37.6	142.3
32.1	121.5	34.9	132.1	37.7	142.7
32.2	121.9	35.0	132.5	37.8	143.1
32.3	122.3	35.1	132.9	37.9	143.5
32.4	122.6	35.2	133.2	38.0	143.8
32.5	123.0	35.3	133.6	38.1	144.2
32.6	123.4	35.4	134.0	38.2	144.6
32.7	123.8	35.5	134.4	38.3	145.0
32.8	124.2	35.6	134.8	38.4	145.4
32.9	124.5	35.7	135.1	38.5	145.7
33.0	124.9	35.8	135.5	38.6	146.1
33.1	125.3	35.9	135.9	38.7	146.5
33.2	125.7	36.0	136.3	38.8	146.9
33.3	126.1	36.1	136.7	38.9	147.3
33.4	126.4	36.2	137.0	39.0	147.6
33.5	126.8	36.3	137.4	39.1	148.0
33.6	127.2	36.4	137.8	39.2	148.4

18:19-3.1 Violations and penalties

(a) Rules concerning violations and penalties follow:

1. Every retail dealer who fails to post and publicly display in the manner required by this [C]chapter, a sign **or signs** stating the price per gallon **or per gallon and per liter** of all motor fuel sold by said retail dealer; or

2. Who sells motor fuel at a price other than the per gallon **or per gallon and per liter** price, as provided by this [C]chapter; or

3.–4. (No change.)

18:19-3.3 Enforcement

The Superintendent, who, together with the Director, has been given enforcement authority pursuant to N.J.S.A. 56:6-4.1 shall, periodically at the request of the Director, meet with or appoint a representative to meet with, the Director or his agent in order to coordinate enforcement activities pursuant to N.J.S.A. 56:6-1 et seq.

OFFICE OF ADMINISTRATIVE LAW NOTE: This proposal was received by the Office of Administrative Law on October 8, 1981 and was inadvertently omitted from the November 2, 1981 New Jersey Register.

Interested persons may submit in writing, data, views or arguments relevent to the proposal on or before December 2, 1981. These submissions, and any inquiries about submissions and responses, should be addressed to:

Jack Silverstein
Chief Tax Counselor
Division of Taxation
West State and Willow Streets
Trenton, New Jersey 08646

The Division of Taxation thereafter may adopt this proposal without further notice (see: N.J.A.C. 1:30-3.5). The adoption becomes effective upon publication in the Register of a notice of adoption.

This proposal is known as PRN 1981-278.

(a)

STATE POLICE RETIREMENT SYSTEM

Retirement
Imminent Death Situations

Adopted Amendment: N.J.A.C. 17:5-5.15

Proposed: December 21, 1981 at 13 N.J.R. 939(b).
Adopted: January 27, 1982, by Board of Trustees of the State Police Retirement System, Anthony P. Ferrazza, Secretary.
Filed: February 24, 1982 as R.1982 d.67, **without change**.

Authority: N.J.S.A. 53:5A-30h.

Effective Date: March 15, 1982.

(b)

NEW JERSEY SPILL COMPENSATION FUND

Regulations Governing New Jersey Spill Compensation Fund
Expenditures in Light of Federal Super Fund

Adopted New Rules: N.J.A.C. 17:26-2

Proposed: January 4, 1982 at 14 N.J.R. 36(b).
Adopted: February 13, 1982 by Kenneth R. Biederman, State Treasurer.
Filed: March 3, 1982 as R.1982 d.79, **without change**.

Authority: N.J.S.A. 58:10-23.11j, o, and t.

Effective Date: March 15, 1982.

TREASURY-TAXATION

(c)

DIVISION OF TAXATION

Motor Fuels Tax
Retail Sales of Motor Fuels; Gallon and Liter Conversions

Adopted New Rules: N.J.A.C. 18:19-2.10 and 18:19-3.3.
Adopted Amendments: N.J.A.C. 18:19-1.1, 2.1, 2.2, 2.6 and 3.1

Proposed: November 16, 1981 at 13 N.J.R. 855(a).
Adopted: March 1, 1982 by Sidney Glaser, Director, Division of Taxation.
Filed: March 1, 1982 as R.1982 d.77, **without change**.

Authority: N.J.S.A. 56:6-6 and P.L. 1981 c.230.

Effective Date: March 15, 1982.

OTHER AGENCIES

(d)

CASINO CONTROL COMMISSION

Applications
Durational Residency Requirement

Adopted Amendments: N.J.A.C. 19:41-4.3

Proposed: January 4, 1982 at 14 N.J.R. 37(a).
Adopted: February 16, 1982 by Casino Control Commission, Theron G. Schmidt, Executive Secretary.
Filed: February 19, 1982 as R.1982 d.63, **without change**.

Authority: N.J.S.A. 5:12-63(c), 5:12-89(b)(4), 5:12-90(c) and 5:12-91(c).

Effective Date: March 15, 1982.

TREASURY–TAXATION

(a)

DIVISION OF TAXATION

Cigarette Tax
Smuggling Unstamped Cigarettes

Proposed Amendment: N.J.A.C. 18:5-12.5

Authorized By: Sidney Glaser, Director, Division of Taxation.
Authority: N.J.S.A. 54:40A-20 and P.L. 1981 c.361.

Interested persons may submit in writing, data, views or arguments relevant to the proposal on or before May 5, 1982. These submissions, and any inquiries about submissions and responses, should be addressed to:

Jack Silverstein
Chief Tax Counselor
Division of Taxation
West State and Willow Streets
Trenton, New Jersey 08646

The Division of Taxation thereafter may adopt this proposal without further notice (see: N.J.A.C. 1:30-3.5). The adoption becomes effective upon publication in the Register of a notice of adoption.

This proposal is known as PRN 1982-112.

The agency proposal follows:

Summary

The Director of the Division of Taxation, pursuant to N.J.S.A. 54:40A-20 and 54:40A-32, is amending N.J.A.C. 18:5-12.5 in order to impose an additional penalty of a monetary nature for illegal transportation of unstamped cigarettes.

Social Impact

This proposal should deter "buttlegging" and increase cigarette tax revenue to this State thus benefiting all New Jerseyans. The additional penalty on "buttleggers" is an opportunity to obtain funds plus reach into the "buttleggers" pocket for the cigarette tax revenue lost for illegal transportation of unstamped cigarettes.

Economic Impact

The economic impact will be upon "buttleggers" who are illegally transporting unstamped cigarettes into or through the State of New Jersey.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]).

18:5-12.5 Civil penalties
(a)–(b) (No change.)
(c) As stated in N.J.S.A. 54:40A-32 (P.L. 1981 c.361), every transporter who violates the provisions of this act is a disorderly person and shall, in addition to such penalties as attached thereto, be liable to a penalty equal to the amount of tax due on any unstamped cigarettes transported by him, which penalty shall be sued for and recovered in the same manner as provided for the penalties imposed by section 601 of the act (N.J.S.A. 54:40A-24).

(b)

DIVISION OF TAXATION

Motor Fuels Tax
Retail Sales of Motor Fuels; Signs for Blending Pumps

Proposed Amendments: N.J.A.C. 18:19-2.2

Authorized By: Sidney Glaser, Director, Division of Taxation.
Authority: N.J.S.A. 56:6-6 and P.L. 1981, c.230.

Interested persons may submit in writing, data, views or arguments relevant to the proposal on or before May 5, 1982. These submissions, and any inquiries about submissions and responses, should be addressed to:

Jack Silverstein
Chief Tax Counselor
Division of Taxation
West State and Willow Streets
Trenton, New Jersey 08646

The Division of Taxation thereafter may adopt this proposal without further notice (see: N.J.A.C. 1:30-3.5). The adoption becomes effective upon publication in the Register of a notice of adoption.

This proposal is known as PRN 1982-120.

The agency proposal follows:

Summary

The proposed amended rule provides that in the case of blending pumps or multiple pumps, a large sign be displayed, readable from the street, showing prices of each blend of gasoline available from such pump or pumps. In addition, the required pump sign would show the highest and lowest price of fuel available from such pump.

Social Impact

The proposed amendment would permit consumers to know the prices of fuels available from blending pumps as they drive into the station. It would require sellers of fuel to display a sign showing prices of fuels sold through blending pumps or multiple pumps.

Economic Impact

The proposed amendment would require that a special sign be posted by sellers of motor fuels through blending pumps. The proposed rule is intended to accomplish the purpose of notice to consumers without imposing on sellers of fuel the burden and added cost of the oversized pump signs on every pump which would be necessary to permit legible display of prices of each type of fuel sold from a blending or multiple pump.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]).

18:19-2.2 Special conditions for price signs
(a)–(b) (No change.)
(c) Any Motor Fuel Retail Dealer possessing built-in masonry [or blending pumps, or other similar devices] of such construction or operation which prohibits the attachment of the price sign in the manner or of the type set forth in **this subchapter** [these regulations] must seek instruction from the Division of Taxation. **A pump sign affixed to a blending pump, multiple pump or other similar device having the capacity to dispense several types of fuel shall display the lowest and highest price of fuel dispensed from such pump, and the owner or operator of such facility shall have one large sign readable from the street which shall indicate the price of each type of fuel dispensed at such pump or pumps.**
(d) (No change.)

(a)

DIVISION OF TAXATION

Motor Fuels Tax
Retail Sales of Motor Fuels; Signs for Blending Pumps

Adopted Amendment: N.J.A.C. 18:19-2.2

Proposed: April 5, 1982 at 14 N.J.R. 331(b).
Adopted: July 22, 1982 by Sidney Glaser, Director, Division of Taxation.
Filed: July 22, 1982 as R.1982 d.257, **without change**.

Authority: N.J.S.A. 56:6-6 and P.L. 1981 c.230.

Effective Date: August 16, 1982.

(b)

DIVISION OF TAXATION

Gross Income Tax
Exclusion of Interest on All-Savers Certificates

Adopted New Rule: N.J.A.C. 18:35-1.16

Proposed: April 5, 1982 at 14 N.J.R. 332(a).
Adopted: July 22, 1982 by Sidney Glaser, Director, Division of Taxation.
Filed: July 22, 1982 as R.1982 d.258, **without change**.

Authority: N.J.S.A. 54A:10-9.

Effective Date: August 16, 1982.

(2) From the junction of Route US 1 and 9 Traffic Circle to Kerlyn Court.

2. No stopping or standing in Hillside Township, Union County:

i. Along both sides:

(1) Within the corporate limits of Hillside Township.

3. No stopping or standing in Union Township, Union County:

i. Along the westbound side:

(1) From the center line of Decker Avenue to the Union Township-Elizabeth City corporate line.

ii. Along the eastbound side:

(1) From the Elizabeth City-Union Township corporate line to a point 200 feet east of Lynmar Way.

TREASURY-TAXATION

(a)

DIVISION OF TAXATION

Motor Fuels Tax
Retail Sales

Proposed Amendment: N.J.A.C. 18:19-2.7

Authorized By: Sidney Glaser, Director, Division of Taxation.
Authority: N.J.S.A. 56:6-6.

Interested persons may submit in writing, data, views or arguments relevant to the proposal on or before August 5, 1982. These submissions, and any inquiries about submissions and responses, should be addressed to:

Jack Silverstein
Chief Tax Counselor
Division of Taxation
West State and Willow Streets
Trenton, New Jersey 08646

The Division of Taxation thereafter may adopt this proposal without further notice (see: N.J.A.C. 1:30-3.5). The adoption becomes effective upon publication in the Register of a notice of adoption.

This proposal is known as PRN 1982-257.

The agency proposal follows:

Summary

The proposal explicitly authorizes the sale at differing prices of similar fuels to cash and credit customers. It requires the posting of both the credit price and the number of cents per gallon (or per gallon and per liter) discount for cash purchasers.

The proposal also requires the clear display of a chart or price list posted on the facility's premises. The chart shall show all prices for all fuels available at the facility and shall be readily accessible to members of the public.

Social Impact

The social impact of the proposal will be to modernize the terms of sale of motor fuels in New Jersey. It will permit sellers of fuel to differentiate in price between purchasers for cash and purchasers for credit. Since cash purchasers will no longer subsidize credit purchasers, the existence of cash discounts will more fairly reflect the costs of fuel purchased to cash and credit customers.

Economic Impact

The economic impact of this proposal is to permit sellers of motor fuels to sell similar products at different prices for cash and credit customers. A discount for cash is deemed to be a term of payment and financing and is in part a reflection of the time value of money. The proposal also authorizes posting of signs so that a customer would be aware of the cash and credit prices offered at a particular facility. The posting of the cash discount signs would involve a cost to the seller of the fuel. The posting of such signs and charts will contribute to the orderliness of the retail market for motor fuels and may result in savings to the consuming public.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

18:19-2.7 Posted prices and brand names; [applied uniformly] **cash discounts**

(a) **Except as provided hereinunder,** [T]the provisions of [Sections 2.1–2.5 of this Chapter] **N.J.A.C. 18:19-2.1 through** 2.5 as they relate to posted prices and brand names are deemed to apply in a uniform and consistent manner to each motor fuel product as such products are identified by the supplier's invoice at the time of the purchase.

(b) A retail dealer may sell similar fuels at different prices to cash and credit customers, and the price posted on top of the pump shall be the credit purchase price. A conspicuous sign shall also be displayed at the pump or at the island posting the price per gallon (or per gallon and per liter) reduction for cash purchases of fuels.

(c) The retail dealer shall display in clear view in a portion of the premises accessible to the public a listing of all fuel prices available at such facility.

[Example:
All gasoline purchased as XYZ Regular will be dispensed from equipment bearing one uniform price and one uniform brand name or, as required, labeled "No Brand".
All motor fuels designated "Housebrand" by the supplier will be treated in like manner.]

(b)

DIVISION OF TAXATION

Gross Income Tax
Setoff of Individual Liability

Proposed Amendments: N.J.A.C. 18:35-2.3, 2.4, 2.5 and 2.7

Authorized By: Sidney Glaser, Director, Division of Taxation.
Authority: N.J.S.A. 54A:9-8.1–8.3 and 54A:9-17(a).

Interested persons may submit in writing, data, views or arguments relevant to the proposal on or before August 5, 1982. These submissions, and any inquiries about submissions and responses, should be addressed to:

Jack Silverstein
Division of Taxation
Trenton, New Jersey 08646

The Division of Taxation thereafter may adopt this proposal without further notice (see: N.J.A.C. 1:30-3.5). The adoption becomes effective upon publication in the Register of a notice of adoption.

This proposal is known as PRN 1982-262.

The agency proposal follows:

(a)

STATE INVESTMENT COUNCIL

State of New Jersey Cash Management Fund Guidelines on Error Correction

Adopted New Rules: N.J.A.C. 17:16-31.15

Proposed: August 16, 1982 at 14 N.J.R. 899(a).
Adopted: September 29, 1982 by State Investment Council, Roland M. Machold, Director, Division of Investment.
Filed: September 30, 1982 as R 1982 d.363, **without change**.

Authority: N.J.S.A. 52:18A-91.

Effective Date: October 18, 1982.

Summary of Public Comments and Agency Responses:
No comments received.

(b)

STATE INVESTMENT COUNCIL

New Jersey State Employees Deferred Compensation Plan

Adopted New Rule: N.J.A.C. 17:16-44

Proposed: August 16, 1982 at 14 N.J.R. 900(a).
Adopted: September 29, 1982 by State Investment Council, Roland M. Machold, Director, Division of Investment.
Filed: September 30, 1982 as R.1982 d.362, **without change**.

Authority: N.J.S.A. 52:18A-91.

Effective Date: October 18, 1982.

Summary of Public Comments and Agency Responses:
No comments received.

TREASURY-TAXATION

(c)

DIVISION OF TAXATION

Motor Fuels Tax
Retail Sales

Adopted Amendment: N.J.A.C. 18:19-2.7

Proposed: July 6, 1982 at 14 N.J.R. 705(a).
Adopted: October 1, 1982 by Sidney Glaser, Director, Division of Taxation.
Filed: October 1, 1982 as R.1982 d.369, **with substantive changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-3.5).

Authority: N.J.S.A. 56:6-6.

Effective Date: October 18, 1982.

Summary of Public Comments and Agency Responses:

Comments and letters received concerning the proposed rule focused upon several areas.

The most significant issue raised in comments was whether the Division should or should not establish standards for motor fuels price signs other than pump top signs. Such signs would include pole signs or street signs, for example. After review of the issues involved, it was determined to allow the Federal rules regarding such signs to be operative in this respect without adding further regulation at the present time at the State level.

Correspondence was received with respect to pricing signs at stations having more than one island. Pursuant to Formal Opinion No. 2-1982 of the New Jersey Attorney General, a determination was made to require uniform posting of the credit card price upon pumps regardless of station configuration. This would permit a uniform standard of comparison for motorists to use. The discount for cash would be calculated at the time of payment in all cases.

Notice was taken that bills are currently pending in the legislature which would authorize self-service of motor fuels in New Jersey. In the event such changes are made concerning motor fuels marketing in this State, it is conceivable that existing rules would be reviewed in light of such future changes.

Full text of the changes between proposal and adoption follows (additions to proposal shown in boldface with asterisks ***thus***).

18:9-2.7 Posted prices and brand names; cash discounts

(a) (No change from proposal.)

(b) A retail dealer may sell similar fuels at different prices to cash and credit customers, and the price posted on top of the pump ***and on the pump meter*** shall be the credit purchase price. A conspicuous sign shall also be displayed at the pump or at the island posting the price per gallon (or per gallon and per liter) reduction for cash purchases of fuels.

(c) (No change from proposal.)

OTHER AGENCIES

(d)

GARDEN STATE PARKWAY

Off-Premise, Outdoor Advertising

Adopted New Rule: N.J.A.C. 19:8-9

Proposed: August 16, 1982 at 14 N.J.R. 901(a).
Adopted: September 28, 1982 by New Jersey Highway Authority, F. Joseph Carragher, Executive Director.
Filed: September 30, 1982 as R.1982 d.361, **without change**.

Authority: P.L. 1981, c.463 (N.J.S.A. 27:12B-20(a)) and N.J.S.A. 27:12B-5(j)(5).

Effective Date: October 18, 1982.

Summary of Public Comments and Agency Responses:
No comments received.

NEW JERSEY STATUTES ANNOTATED

56:6–1 UNFAIR TRADE PRACTICES

Sec.

56:6–7. Audit, examination or investigation of books.
56:6–8. Hearings; oaths; examination of witnesses.
56:6–9. Subpoenas; fees of witnesses.
56:6–10. Refusal to obey subpoena; application to supreme court; contempt.
56:6–11. Assistant or deputy commissioner; civil service.
56:6–12. Records by retail dealer; preservation for one year.
56:6–13. Record of commissioner's official act; copies of rules, regulations, etc.
56:6–14. Suspension or revocation of license; notice.
56:6–15. Enforcement expenses.
56:6–16. Separability of provisions.
56:6–17. Title of Act.
56:6–18. Blank.
56:6–19. Legislative declaration of policy.
56:6–20. Short title.
56:6–21. Definitions.
56:6–22. Rebates, allowances and discounts; leases and contracts; discrimination in price; violations a misdemeanor.
56:6–23. Contracts in violation of act.
56:6–24. Rules and regulations.
56:6–25. Action to restrain violation; action for damages.
56:6–26. Suspension or revocation of license; reinstatement.
56:6–27. Sale during suspension or revocation of license prohibited; disciplinary proceedings, bar or abatement of.
56:6–28. Review of suspension or revocation or refusal to reinstate license.
56:6–29. Enforcement of act; employment of inspectors and other personnel.
56:6–30. Powers available in enforcement of act.
56:6–31. Partial invalidity.
56:6–32. Effective date.

56:6–1. Definitions

Words used in this act, unless otherwise expressly stated, or unless the context or subject matter otherwise requires, shall have the following meaning:

"Person" shall mean and include natural persons and partnerships, firms, associations, joint stock companies, syndicates and corporations and any receiver, trustee, conservator or other officer appointed pursuant to law by any court, State or Federal. The use of the singular number shall include the plural number.

"Retail dealer" [1] any person operating a service station, filling station, store, garage or other place of business for the sale of

motor fuel for delivery into the service tank or tanks of any vehicle propelled by an internal combustion engine.

"Motor fuel" shall mean (a) all products commonly or commercially known or sold as gasoline (including casinghead and absorption or natural gasoline), benzol, benzene, or naphtha regardless of their classification or uses; and (b) any liquid prepared, advertised, offered for sale or sold for use as or commonly and commercially used as a fuel in internal combustion engines, which when subjected to distillation in accordance with the standard method of test for distillation of gasoline, naphtha, kerosene and similar petroleum products (American Society of Testing Material Designation D–86) shows not less than ten per centum (10%) distilled (recovered) below three hundred forty-seven degrees (347°) Fahrenheit (one hundred seventy-five degrees (175°) Centigrade) and not less than ninety-five per centum (95%) distilled (recovered) below four hundred sixty-four degrees (464°) Fahrenheit (two hundred forty degrees (240°) Centigrade); and (c) any other product or liquid when sold for use as a fuel in any type of internal combustion engine furnishing power to operate a motor vehicle.

"Sale" shall have its ordinary meaning and, in addition, shall include any exchange, gift or other disposition; and "purchase" shall include any acquisition of ownership.

"Selling expense" includes all overhead and general business expense.

"Commissioner" shall mean the State Tax Commissioner. L. 1938, c. 163, p. 362, art. I, § 101; L.1938, c. 401, p. 991, § 1.

[1] Words "shall mean" probably should be inserted.

Library references: Trade Regulation ⊂⊃873; C.J.S. Trade-Marks, Trade-Names, and Unfair Competition § 237.

Historical Note

The amendment to L.1938, c. 163, by L.1938, c. 401 consisted in omitting from definition of "Persons" the following clause "and shall also include counties, municipalities and other political subdivisions of this state, and also the State of New Jersey."

L.1938, c. 163, p. 372, art. VIII, § 801, repealed all inconsistent acts and parts of acts and section 803 as amended by P.L.1938, c. 204, p. 485, § 1, provided that the act should take effect June 1, 1938.

Title of Act:

An Act to regulate the retail sale of motor fuels, and providing penalties for violations. L.1938, c. 163, p. 362.

56:6–2. Posting prices; advertising and sale of motor fuels; rebates, allowances, etc.; lotteries, prizes, etc.; name or trade-mark on above-ground equipment

(a) Every retail dealer shall publicly display and maintain on each pump or other dispensing equipment from which motor fuel is sold, in the manner regulated by the State Tax Commissioner, a sign stating the price per gallon of the motor fuel sold by said dealer from such pump or other dispensing equipment. All taxes, State and Federal, imposed with respect to the manufacture or sale of motor fuel shall be included in the price shown on said sign, but said sign shall contain a statement of the amount of taxes included in said price, or, without specifying the amount thereof, said sign shall state that taxes are included in said price. A retail dealer shall not sell at any other price than the price, including tax, so posted. Any such price when posted shall remain posted and in effect for a period of not less than twenty-four (24) hours.

(b) No retail dealer shall sell motor fuel at a price which is below the net cost of such motor fuel to the retail dealer plus all selling expenses.

(c) No other price signs of motor fuel so dispensed, or signs relating to the price of such fuel shall be used or displayed on or about the premises where motor fuel is sold at retail, other than the signs provided herein by section two hundred one (a).

(d) No advertising or sign other than that provided for in section two hundred one (a), which directly or indirectly contains a statement of, or an implied reference to the price of motor fuel shall be displayed at any place where motor fuel is dispensed at retail. Any advertising of the retail price of motor fuel through any other medium which contains a reference to the per gallon price thereof, shall include all taxes in the price stated, and there shall be included in such advertising a statement that such price includes taxes, or a statement of the amount of taxes which are included in such price. Such advertising shall be identified by the name of the product, and the letters of the name shall be not less than one-half the size of the figures used in the price.

(e) No rebates, allowances, concessions or benefits shall be given, directly or indirectly, so as to permit any person to obtain motor fuels from a retail dealer below the posted price or at a net price lower than the posted price applicable at the time of the sale.

(f) It shall be unlawful for any retail dealer to use lotteries, prizes, wheels of fortune, punch-boards or other games of chance, in connection with the sale of motor fuels.

(g) All above-ground equipment for storing or dispensing motor fuel operated by a retail dealer shall bear, in a conspicuous place, the name or trade-mark of the product stored therein or dispensed therefrom, and no retail dealer shall permit delivery into underground or above-ground containers, tanks or equipment of any motor fuel other than the brand represented or designated by the name or trade-mark appearing on such container or dispensing equipment attached thereto. No retail dealer shall be a party to the substitution of one grade of motor fuel for another.

(h) If the motor fuel stored in or dispensed from any above-ground equipment by a retail dealer shall not have a brand name or trade-mark, such container or dispensing equipment shall have conspicuously displayed thereon the words "No Brand." L.1938, c. 163, p. 363, art. II, § 201; L.1939, c. 62, p. 103, § 1.

[1] Subsection (a) of this section.

Historical Note

The 1939 amendment to this section, consisted in the following changes: Subdivision (a) was amended by adding in two places the words "other dispensing equipment."

Subdivision (c) before its amendment read as follows: "(c) Any price signs, other than those required by section 201(a), displayed by any retail dealer shall be displayed in a manner to be regulated by the State Tax Commissioner and shall state the per gallon price including the tax. Such signs may include references to the brand name or trade-mark of such motor fuel and claims for its quality, and shall include a statement of the amount of taxes included in the sale price, or, without specifying the amount thereof said signs shall state that taxes are included in said price."

Subdivision (d) before its amendment read as follows: "(d) Any advertising of motor fuels by a retail dealer which contains a reference to the per gallon price thereof shall include all taxes in the price stated; and there shall be included in such advertising a statement that such price includes taxes or a statement of the amount of taxes which are included in such price."

Notes of Decisions

Construction and application 2
Rebates, etc. 3
Validity 1

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1. Validity

Subd. (e) of this section prohibiting any rebates in retail sale of gasoline which could result in sale below posted price is a reasonable exercise of police power, and is not arbitrary or discriminatory. Fried v. Kerrick, 34 N.J. 68, 167 A.2d 380 (1961).

Paragraph (e) of this section prohibiting dealers from giving rebates, allowances, concessions or benefits, as applied to prohibit retailers from giving their customers, with each cash purchase, stamps which were thereafter redeemable in cash or merchandise at rate of 1.66 per cent or 2.08 per cent of the purchase price

in connection with which they were given, constituted an arbitrary, discriminatory and unreasonable interference with private business and was, therefore, unconstitutional. Sperry & Hutchinson Co. v. Margetts, 25 N.J.Super. 568, 96 A.2d 706 (1953), affirmed 15 N.J. 203, 104 A.2d 310.

Paragraph (b) of this section which provides that retail dealer may not sell motor fuel below the net cost plus all selling expenses, but which does not define net cost, is unenforceable for uncertainty. Neeld v. Automotive Products Credit Ass'n, 21 N.J.Super. 159, 90 A.2d 558 (1952).

Subdivision (c) of this section, relating to the price of fuel cannot be justified as valid exercise of police power on ground that it prevents ruinous price wars between dealers and prevented fraud since there is nothing which would make dealers in the sale of motor fuels any more immune from tense competition than other merchantmen. Regal Oil Co. v. State, 123 N.J.L. 456, 10 A.2d 495 (1940).

Subdivision (c), providing that no other price sign of motor fuel so dispensed or signs relating to the price of such fuel shall be displayed other than the signs provided by statute has no substantial relation to public health, public morals or some other phase of general welfare and unlawfully interferes with and imposes unreasonable restriction upon motor fuels dealers' private business and is unconstitutional as depriving dealer of property without due process of law. Id.

Subdivision (c) of this section cannot be justified as valid exercise of police power on ground that it prevents ruinous price wars between dealers and prevented fraud, since there is nothing which would make dealers in the sale of motor fuels any more immune from tense competition than other merchantmen. Id.

Subdivision (c) would not justify penalizing a dealer who used signs larger than those specified on ground that statute was enacted to prevent fraud and misrepresentation in industry. Id.

2. Construction and application

Provision of subd. (e) forbidding retail gasoline dealer from giving any rebate which would result in sale below posted price is in pari materia with 1938 amendment of Fair Trade Act. Fried v. Kervick, 34 N.J. 68, 167 A.2d 380 (1961).

Anti-concession clause of this section was designed to implement and prevent evasion of statutory injunction against sales of motor fuels at a price other than a price posted. Sperry & Hutchinson Co. v. Margetts, 15 N.J. 203, 104 A.2d 310 (1954).

Stamps which were given to customers with cash purchases of merchandise, or of gasoline at posted price, and which were thereafter redeemable in cash or merchandise at a rate of 1.66 per cent or 2.08 per cent of the purchase price in connection with which they were given, constituted a "discount for cash" and, therefore, did not diminish the price at which the gasoline or other products were actually sold. Sperry & Hutchinson Co. v. Margetts, 25 N.J. Super. 568, 96 A.2d 706 (1953), affirmed 15 N.J. 203, 104 A.2d 310.

Regulation of prices of merchandise not affected with a public interest without relation to injurious effect in stifling competition is prohibited. Neeld v. Automotive Products Credit Ass'n, 21 N.J.Super. 159, 90 A.2d 558 (1952).

3. Rebates, etc.

Issuance of trading stamps having a redemption value did not constitute giving a rebate, concession or benefit. Sperry & Hutchinson Co. v. Margetts, 15 N.J. 203, 104 A.2d 310 (1954).

Paragraph (e) of this section, the avowed purpose of which is the prevention of fraudulent and unfair practices in the retailing of motor fuels, by an omission of the cash discount from rebates, concessions, etc., which it forbids, indicates an intention that the cash discount is not forbidden. Id.

56:6–2.1 Price signs to be displayed in accordance with act

All signs relating to the price of motor fuel being sold or dispensed by a retail dealer shall be used and displayed in accordance with the provisions of this act and the act to which this is a supplement.[1] L.1952, c. 258, p. 880, § 1.

[1] Sections 56:6–1, 56:6–2, 56:6–3 to 56:6–17.

Library references: Trade Regulation ⇐873; C.J.S. Trade-Marks, Trade-Names, and Unfair Competition § 237.

Historical Note

Preamble:

L.1952, c. 258, p. 879, contained the following Preamble:

"Whereas, The distribution and sale of gasoline at retail within the State of New Jersey represents an integral part of the economic life of the State affecting the welfare and prosperity of its people: and

"Whereas, There are approximately ten thousand retail gasoline dealers engaged in the distribution and sale of gasoline at retail in the State of New Jersey: and

"Whereas, The distribution and retail sale of gasoline in the State of New Jersey produces State tax revenue in excess of thirty-five million dollars ($35,000,000.00) annually; and

"Whereas, Grave economic harm to the general welfare of the people may result if certain unfair trade practices are permitted and unrestricted; and

"Whereas, Such unfair practices if unrestricted will bring about ruinous and chaotic conditions threatening the economic existence of retail dealers engaged in such business; and

"Whereas, It is desirable to eliminate the fraudulent methods, practices and courses of conduct which affect the safety and welfare of the public generally; and

"Whereas, In exercise of the police power it is hereby declared to be the expressed policy of the State of New Jersey that the retail sale of gasoline is affected with and shall be impressed with the public interest in order to eliminate the aforementioned abuses, conditions, and trade practices and to eliminate evasion of the payment of taxes; and

"Whereas, It is hereby declared by the Legislature, in the exercise of the police power reserved to the State in order to adequately protect the public safety and general welfare of all of the people, that this statute be enacted in the interest and for the preservation of the public welfare, public health and public safety; therefore."

Title of Act:

A Supplement to "An act to regulate the retail sale of motor fuels, and providing penalties for violations," approved May twelfth, one thousand nine hundred and thirty-eight (P.L.1938, c. 163). L.1952, c. 258, p. 879.

56:6–2.2 Price signs to be displayed on pump and equipment only

Signs under the control of the retail dealer, stating the price of motor fuel for delivery into the service tank or tanks of any vehicle propelled by an internal combustion engine, shall be displayed and maintained on each pump or other dispensing equipment from which motor fuel is sold. No other sign relating to the price of motor fuel shall be used or displayed on or about the premises where the motor fuel is sold at retail or on other

56:6–2.2 UNFAIR TRADE PRACTICES

premises under the control of the retail dealer. L.1952, c. 258, p. 880, § 2.

Library references: Trade Regulation ⇐873; C.J.S. Trade-Marks, Trade-Names, and Unfair Competition § 237.

56:6–2.3 Case for displaying prices; manner of stating prices

No retail dealer shall sell or offer for sale any motor fuel without having attached by a suitable bracket or slot arrangement in a manner regulated by the Director of the Division of Taxation to each pump or other dispensing equipment from which motor fuel is sold or offered for sale a weather-proof case not less than five and one-half inches by eight inches and not more than eight inches by ten inches, on both sides of which will be displayed a card insert price sign not less than five inches by seven and one-half inches and not more than seven and one-half inches by nine inches, stating the price per gallon at which motor fuel may be purchased from such pumps or other dispensing equipment. The price signs shall show only the unit price per gallon. Such unit price shall include all taxes imposed, whether State or Federal. Beneath the unit price there shall be either the statement:

"Includes ..... N. J. Tax—
(insert the tax per gallon)
..... Federal Tax," "Includes
(insert the tax per gallon)
State and Federal Taxes," "Includes N. J. and U. S. Taxes," or "Includes all Taxes."

The whole numbers in the unit price of the price sign shall be at least three and one-half inches high. When a fraction is part of the unit price, the figures in the numerator and denominator shall be at least one and one-half inches high and the total size including the numerator, the line dividing the numerator and denominator, and the denominator shall be at least three and one-half inches high. As a substitute for the fraction there may be used only the numerator of the fraction, in which case, the numerator figure shall be one-half the size of those in the whole number. The statement that all taxes are included shall be in letters at least three-eighths of an inch high. The colors of all price signs shall be of such combination that the sign may be easily read by any person purchasing motor fuel from the pump or other dispensing equipment to which the sign is attached. Any figure or fraction used in any price computing mechanism constituting a part of a computing pump or any other dispensing

equipment shall not be considered a price sign under the provisions of this section. L.1952, c. 258, p. 881, § 3.

Library references: Trade Regulation ⇐873; C.J.S. Trade-Marks, Trade-Names, and Unfair Competition § 237.

56:6–2.4 No signs relating to prices to be posted except those authorized

No signs stating or relating to the price of motor fuel and no signs designed or calculated to cause the public to believe that they state or relate to the price of motor fuel other than the signs provided for herein and required to be displayed upon pumps and other dispensing equipment, shall be posted or displayed on or about the premises where motor fuel is sold at retail and within view from any public highway or reservation. L.1952, c. 258, p. 882, § 4.

Library references: Trade Regulation ⇐873; C.J.S. Trade-Marks, Trade-Names, and Unfair Competition § 237.

56:6–2.5 Inconsistent acts superseded

This act shall supersede any and all acts or parts of acts inconsistent herewith. L.1952, c. 258, p. 882, § 5.

Library references: Trade Regulation ⇐873; C.J.S. Trade-Marks, Trade-Names, and Unfair Competition § 237.

56:6–3. Violations and penalties

Every retail dealer who shall fail to post and publicly display, in the manner herein required, a sign stating the price per gallon of all motor fuel sold by said retail dealer, or who shall sell motor fuel at a price other than the per gallon price, as provided in article II hereof,[1] or who shall violate any other provisions of article II of this act, shall, upon conviction, be subject to a penalty of not less than fifty dollars ($50.00) nor more than two hundred dollars ($200.00) for each such offense, and his license shall be suspended for a period of not less than five (5) days nor more than thirty (30) days, and in default of the payment of such penalty shall be imprisoned for a period not to exceed thirty days. If there shall be a conviction upon a second or subsequent offense, the license of the convicted retail dealer, issued under the provisions and procedure in chapter thirty-nine of Title 54 of the Revised Statutes,[2] shall be revoked by the State Tax Commissioner. L.1938, c. 163, p. 365, art. III, § 301; L.1939, c. 62, p. 105, § 2.

[1] Section 56:6–2.

[2] Section 54:39–1 et seq.

Library references: Trade Regulation ⇐873; C.J.S. Trade-Marks, Trade-Names, and Unfair Competition § 237.

tories. Limited v. Vornado, Inc., 90 N.J. Super. 404, 217 A.2d 889 (1966).

11. Circumventing purpose of statute
Under New Jersey Fair Trade Act a producer may not market, in combination, fair traded articles or even articles fair traded with articles not fair traded if marketing is done in such fashion as to subvert the principles of fair trade legislation. Upjohn Co. v. Vineland Discount Health & Vitamin Center, Inc., D.C., 235 F.Supp. 191 (1964).

12. Price discrimination
Price discrimination to customers is valid if reasonable. Menley and James Laboratories, Limited v. Vornado, Inc., 90 N.J.Super. 404, 217 A.2d 889 (1966).

ARTICLE 3. FAIR SALES ACT [REPEALED]

56:4-7 to 56:4-15. Repealed by L.1975, c. 107, § 1

Effective date of L.1975, c. 107, see note under § 56:4-1.

CHAPTER 6. MOTOR FUELS

Sec.

56:6-4.1 State and local government weights and measure officer: action to recover penalties; jurisdiction; process; docket of judgment; injunctions; disposition of penalty moneys [New].

Administrative Code References
Motor fuels-retail sales, see N.J.A.C. 18:18-1.1.

56:6-2. Posting prices; advertising and sale of motor fuels; rebates, allowances, etc.; lotteries, prizes, etc.; name or trade-mark on above-ground equipment

(a) Every retailer shall publicly display and maintain ~~on each pump or other dispensing equipment from which motor fuel is sold~~, in the manner regulated by the ~~State Tax Commissioner~~ Director of the Division of Taxation, a sign stating the price per gallon if sold by the gallon, and per gallon and per liter if sold by the liter of the motor fuel sold by said dealer ~~from such pump or other dispensing equipment~~. All taxes, State and Federal, imposed with respect to the manufacture or sale of motor fuel shall be included in the price shown on said sign, but said sign shall contain a statement of the amount of taxes included in said price, or, without specifying the amount thereof, said sign shall state that taxes are included in said price. A retail dealer shall not sell at any other price than the price, including tax, so posted. Any such price when posted shall remain posted and in effect for a period of not less than twenty-four (24) hours.

(b) No retail dealer shall sell motor fuel at a price which is below the net cost of such motor fuel to the retail dealer plus all selling expenses.

(c) No other price signs of motor fuel so dispensed, or signs relating to the price of such fuel shall be used or displayed on or about the premises where motor fuel is sold at retail, other than the signs provided ~~herein~~ by section ~~two hundred one (a)~~ 3 of P.L.1952, c. 258 (C. 56:6-2.3).

(d) No advertising or sign other than that provided for in section ~~two hundred one (a)~~ 3 of P.L.1952, c. 258 (C. 56:6-2.3), which directly or indirectly contains a statement of, or an implied reference to the price of motor fuel shall be displayed at any place where motor fuel is dispensed at retail. Any advertising of the retail price of motor fuel through any other medium which contains a reference to the per gallon or per liter price thereof, shall include all taxes in the price stated, and there shall be included in such advertising a statement that such price includes taxes, or a statement of the amount of taxes which are included in such price. Such advertising shall be identified by the name of the product, and the letters of the name shall be not less than one-half the size of the figures used in the price.

(e) No rebates, allowances, concessions or benefits shall be given, directly or indirectly, so as to permit any person to obtain motor fuels from a retail

Note 1

dealer below the posted price or at a net price lower than the posted price applicable at the time of the sale.

(f) It shall be unlawful for any retail dealer to use lotteries, prizes, wheels of fortune, punchboards or other games of chance, in connection with the sale of motor fuels.

(g) All above-ground equipment for storing or dispensing motor fuel operated by a retail dealer shall bear, in a conspicuous place, the name or trade-mark of the product stored therein or dispensed therefrom, and no retail dealer shall permit delivery into underground or above-ground containers, tanks or equipment of any motor fuel other than the brand represented or designated by the name or trade-mark appearing on such container or dispensing equipment attached thereto. No retail dealer shall be a party to the substitution of one grade of motor fuel for another.

(h) If the motor fuel stored in or dispensed from any above-ground equipment by a retail dealer shall not have a brand name or trade-mark, such container or dispensing equipment shall have conspicuously displayed thereon the words "No Brand."

Amended by L.1981, c. 230, § 1.

Section 7 of L.1981, c. 230, approved July 27, 1981, provides:

"This act shall take effect on the first day of the seventh month next following enactment."

Administrative Code References

Posted prices, advertising, rebates, allowances and prizes: trade-marks, see N.J.A.C. 18:19–2.1 et seq.

Rebates of allowances, lotteries and games of chance, see N.J.A.C. 18:19–2.3.

Law Review Commentaries

Overview of New Jersey Antitrust Law, Michael J. Perrucci and Joseph A. Mussonell (Summer 1977) 2 Seton Hall Legis.J. 134.

Supplementary Index to Notes

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1. Validity

This section constitutes a reasonable exercise of police power. United Stations of New Jersey (US) v. Getty Oil Co., 102 N.J.Super. 459, 246 A.2d 150 (1968), affirmed 54 N.J. 150, 253 A.2d 813.

2. Construction and application

Action of director of division of taxation in giving notice and determining, inter alia, that giveaways, were deemed illegal denied due process of law to oil companies who were not parties to action brought by director to enjoin alleged statutory violation by gasoline retailer, whose interests were not represented, and who were unaware of pendency of action or of permanent injunction eventually entered, and was invalid, where director gave no notice of his intended issuance of that notification, no opportunity was given to interested persons to submit data, no hearing was held with regard to notice, director gave no consideration to any data, and director never filed notice with Secretary of State. Glaser v. Downes, 126 N.J.Super. 10, 312 A.2d 654 (1973).

Fact that fair trade contracts were no longer enforced in gasoline industry did not render inapplicable this section generally banning rebates and discounts from posted motor fuel prices. Glaser v. Downes, 120 N.J.Super. 476, 295 A.2d 10 (1972), affirmed 126 N.J.Super. 10, 312 A.2d 654.

Catch-all phrase "other games of chance," in this section prohibiting games of chance in connection with sale of motor fuels denoted ban on class of giveaway promotions broader than conventional cash consideration lottery. United Stations of N. J. (US) v. Kingsley, 99 N.J.Super. 574, 240 A.2d 702 (1968), affirmed 54 N.J. 150, 253 A.2d 813.

Definition of lottery in § 2A:121–6 making consideration an indispensable element of a lottery should not control construction of this section prohibiting lotteries in connection with sale of motor fuels. Id.

2.5 Purpose

Purpose of this act entitled "an act to regulate retail sale of motor fuels" is regulation of competitive practices in the retail motor fuel business and it is from that standpoint that the prohibition of games of chance in § 56:6–2 should be viewed. United Stations of New Jersey (US) v. Getty Oil Co., 102 N.J.Super. 459, 246 A.2d 150 (1968), affirmed 54 N.J. 150, 253 A.2d 813.

3. Rebates, etc.

Retail motor fuels dealer's trading stamp practice of issuing three trading stamps for each $.10 worth of motor fuel purchased violated this section generally prohibiting rebates and discounts for posted motor fuel prices. Glaser v. Downes, 126 N.J.Super. 10, 312 A.2d 654 (1973).

Evidence in action to enjoin gasoline retailer from distributing more than one trading stamp for each ten cents of motor fuel purchased failed to show anything which would warrant a finding that either the state's enforcement policy against gasoline dealers or its endeavor to enjoin trade stamp practice of defendant denied defendant equal protection of the laws in view of state's position that gifts, bonus trading stamps and giving of items such as postage stamps are all illegal under the statutory provisions banning rebates and discounts from posted motor fuel prices. Glaser v. Downes, 120 N.J.Super. 476, 295 A.2d 10 (1972), affirmed 126 N.J. Super. 10, 312 A.2d 654.

Gasoline dealer's practice in giving three trading stamps for each ten cents worth of motor fuel purchased rather than the practice of giving one trading stamp for each ten cents of motor fuel purchased as upheld by Supreme Court decision violated this section banning

Note 6

6. Games of chance

Despite the "no purchase necessary" feature of retail gasoline service station dealers' giveaway contests, contests were "games of chance" within this section prohibiting retail dealer from using lotteries, prizes or other games of chance in connection with sale of motor fuels. United Stations of New Jersey (US) v. Getty Oil Co., 102 N.J. Super. 459, 246 A.2d 150 (1968), affirmed 54 N.J. 150, 253 A.2d 813.

In requiring participants in retail gasoline service station dealers' giveaway contests to visit premises of a retail dealer, dealer receives consideration in expectation that that lure will result in an increase in his motor fuel sales so that, even if consideration is required under this section prohibiting games of chance in connection with sale of motor fuels, such contests violate this section. Id.

Evidence established that principal purpose of retail gasoline service station dealers' giveaway contest was to effect for the participating dealer an immediate increase in motor fuel sales to detriment of his competitor's business, in action to enjoin contests. Id.

Definition of a lottery in criminal Lottery Act (section 2A:121-6) does not control trade regulatory provision prohibiting retail gasoline service station dealers from using lotteries in connection with sale of motor fuels. Id.

Whether games of chance conducted by operator of service station's competitors were not operated in connection with sale of motor fuels because no purchase of fuel was necessary to enter them was issue to be explored in plenary hearing where oil company representatives filed affidavits averring that game was intended as advertising but where "no purchase necessary" contest might furnish effective competitive advantage in sale of motor fuels. United Stations of N. J. (U.S.) v. Kingsley, 99 N.J.Super. 574, 240 A.2d 702 (1968), affirmed 54 N.J. 150, 253 A.2d 813.

Game transmitted by cable television company characterized as "bingo" whose format is identical to bingo in all respects except the consideration which consists of cards given without charge and without condition of purchase by visit to one of the participating stores by the viewer sponsored by a service station violates a provision of this section controlling the retail sale of motor fuels which prohibits the use of lotteries or other games of chance in connection with the sale of motor fuels. Atty.Gen. F.O.1968, No. 9.

7. Competition

Evidence established that gasoline service stations of plaintiff and defendant were competitors, although they were located about two miles apart, in action to enjoin games of chance conducted by defendant in sale of motor fuels. United Stations of New Jersey (US) v. Getty Oil Co., 102 N.J.Super. 459, 246 A.2d 150 (1968), affirmed 54 N.J. 150, 253 A.2d 813.

Defendant's gasoline service station situated just beyond a 1¼ mile radius from plaintiff's station was a competitor of plaintiff for purposes of enjoining unfair competition, where commuter traffic patterns tended to corroborate inference that there was some competition for trade between stations in defendant's locality and those located near plaintiff and that local as well as transient trade may have bypassed or was likely to bypass plaintiff's station in order to participate in game conducted at defendant's station. Id.

8. Brand or trade mark

Oil company would be entitled to injunctive and declaratory relief on counterclaims alleging that wholesale and retail distributor of oil company's fuel commingled oil company gasoline with nonoil company gasoline, sold nonoil company gasoline and diesel fuel as oil company product and used trucks carrying oil company's brand to deliver nonoil company fuel. Erward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, C.A.1980.

56:6-2.2 Price signs; display and maintenance

Signs under the control of the retail dealer, stating the price of motor fuel for delivery into the service tank or tanks of any vehicle propelled by an internal combustion engine, shall be displayed and maintained ~~on each pump or other dispensing equipment from which motor fuel is sold~~ as provided for in section 3 of P.L.1952, c. 258 (C. 56:6-2.3). No other sign relating to the price of motor fuel shall be used or displayed on or about the premises where the motor fuel is sold at retail or on other premises under the control of the retail dealer.

Amended by L.1981, c. 230, § 3.

Effective date of L.1981, c. 230, see note under § 56:6-2.

56:6-2.3 Case for displaying prices; manner of stating prices

No retail dealer shall sell or offer for sale any motor fuel without having a. attached by a suitable bracket or slot arrangement in a manner regulated by the Director of the Division of Taxation to each pump or other dispensing equipment from which motor fuel is sold or offered for sale a weather-proof case ~~not less than 3½ inches by 8 inches and not more than 8 inches by 10 inches, on both sides of which will be displayed a card insert price sign not less than 5 inches by 7½ inches by 9 inches,~~ of such dimensions as shall be prescribed by the director, or b. displayed by a sign or signs located on

the premises and visible from any adjacent roadway in a manner and of such dimensions as shall be prescribed by the director, or c. both, as the director may prescribe, stating the price per gallon, or the price per gallon and per liter, at which motor fuel may be purchased from such pumps or other dispensing equipment. The price signs shall show ~~only~~ the unit price per gallon, or if sold by the liter the unit price per gallon and the unit price per liter. If sold by the liter, the price per gallon shall be located on the top half of the sign and the price per liter shall be located on the bottom half of the sign on differing background colors, such colors to be designated by the director. Such unit price shall include all taxes imposed, whether State or Federal. Beneath the unit price there shall be either the statement:

"Includes ..... N.J. Tax— .....
(insert the tax per gallon) (insert the tax per gallon)
Federal Tax," "Includes State and Federal Taxes," "Includes N.J. and U.S. Taxes," or "Includes all Taxes."

The colors of all price signs shall be of such combination that the sign may be easily read by any person purchasing motor fuel from the pump or other dispensing equipment to which the sign is attached. Any figure or fraction used in any price computing mechanism constituting a part of a computing pump or any other dispensing equipment shall not be considered a price sign under the provisions of this section.
Amended by L.1981, c. 230, § 4.

1981 amendment also deleted former four sentences immediately following form of statement.

Effective date of L.1981, c. 230, see note under § 56:6-2.

Administrative Code References

Posted prices; advertising; rebate; allowances and prizes; trade-marks, see N.J.A.C. 18:19-2.1 et seq.

Special conditions for price signs, see N.J.A.C. 18:19-2.2.

1. In general

This section requiring that gasoline retailer post unit price separately stating the state and federal gasoline taxes was designed to control practice of deceiving public with respect to prices charged for gasoline and to prevent unfair practices, and does not evidence an intent that such taxes constitute a tax on the consumer or that such taxes were not includable in computation of gross receipts for purposes of Unincorporated Business Tax Act. Ferrara v. Director, Division of Taxation, 127 N.J. Super. 240, 317 A.2d 80 (1974).

56:6-2.4 No signs relating to prices to be posted except those authorized

No sign stating or relating to the price of motor fuel and no signs designed or calculated to cause the public to believe that they state or relate to the price of motor fuel other than the signs provided for herein ~~and required to be displayed upon pumps and other dispensing equipment~~, shall be posted or displayed on or about the premises where motor fuel is sold at retail and within view from any public highway or reservation.
Amended by L.1981, c. 230, § 5.

Effective date of L.1981, c. 230, see note under § 56:6-2.

56:6-3. Violations and penalties

Every retail dealer who shall fail to post and publicly display, in the manner herein required, a sign stating the price per gallon, or per gallon and per liter, of all motor fuel sold by said retail dealer, or who shall sell motor fuel at a price other than the per gallon or per liter price, as provided in article II hereof,[1] or who shall violate any other provisions of article II of this act, shall, upon conviction, be subject to a penalty of not less than fifty dollars ($50.00) nor more than two hundred dollars ($200.00) for each such offense, and his license shall be suspended for a period of not less than five (5) days nor more than thirty (30) days, and in default of the payment of such penalty shall be imprisoned for a period not to exceed 30 days. If there shall be a conviction upon a second or subsequent offense, the license

of the convicted retail dealer, issued under the provisions and procedure in chapter thirty-nine of Title 54 of the Revised Statutes,[2] shall be revoked by the ~~State Tax Commissioner~~ Director of the Division of Taxation.

Amended by L.1981, c. 230, § 2.

[1] Section 56:6-2.
[2] Section 54:39-1 et seq.

Effective date of L.1981, c. 230, see note under § 56:6-2.

Administrative Code References
Preparation of fines, see N.J.A.C. 18:19-3.1, 18:19-3.2.

1. Construction and application
This section providing for recovery of penalty for illegal rebates in sale of gasoline, is not criminal or quasi-criminal, but civil in nature, notwithstanding provision for license suspension. Kingsley v. Miller, 216 A.2d 11, 90 N.J.Super. 9 (1965).

This section providing for penalty for giving illegal rebate in sale of gasoline is remedial as well as penal and should not be strictly construed so as to relieve employer of liability for acts of employee not shown to be expressly authorized. Id.

56:6-4. Procedure for collection of penalties

Administrative Code References
Injunction to prohibit violations, see N.J.A.C. 18:19-6.1.
Preparation of fines, see N.J.A.C. 18:19-3.1, 18:19-3.2.

1. Injunction
Operator of gasoline filling station had standing to sue and had private right to injunctive relief against competing retailers who sponsored, promoted or conducted giveaways allegedly in violation of this section making it unlawful for any retailer to use games of chance in connection with sale of motor fuels and allegedly harming or threatening to harm operator's business and his right to conduct a business. United Stations of N. J. (U.S.) v. Kingsley, 99 N.J.Super. 574, 240 A.2d 702 (1968), affirmed 54 N.J. 150, 253 A.2d 813.

56:6-4.1 State and local government weights and measure officer; action to recover penalties; jurisdiction; process; docket of judgment; injunctions; disposition of penalty moneys

a. The State Superintendent of Weights and Measures or any State, county, or municipal weights and measures officer may also recover penalties for violations of P.L.1938, c. 163 (C. 56:6-1 et seq.). The action shall be within the jurisdiction of and may be brought before any Superior Court, county district court, or municipal court in the county or municipality where the offense was committed, or where the defendant may reside, or where the defendant may be apprehended, which court is hereinafter referred to as the court, upon the filing of a complaint by a weights and measures officer, in a civil penalty action pursuant to "the penalty enforcement law" (N.J.S. 2A:58-1 et seq.).

b. The State Superintendent or any weights and measures official shall be authorized to serve all process out of said court.

c. Any judgment recovered for a penalty under the provisions of P.L. 1938, c. 163 (C. 56:6-1 et seq.), in any municipal court or any county district court may be docketed with the Superior Court. Execution may issue in a manner similar to that for other Superior Court judgments.

d. Any habitual violations of provisions of P.L.1938, c. 163 (C. 56:6-1 et seq.), or of any orders or rules or regulations made pursuant to said statutes may be restrained by the Superior Court in an action brought for such purpose by the Attorney General on behalf of the State Superintendent of Weights and Measures.

e. Penalties, when imposed or recovered in an action brought by a State weights and measures officer, shall be payable to the State Treasurer. When such action is brought by a county or municipal weights and measures officer, the penalty moneys shall be paid to the respective county or municipal treasury, as the case may be.
L.1981, c. 230, § 3.

Effective date of L.1981, c. 230, see note under § 56:6-2.

Title of Act:
An Act concerning the sale of motor fuels, and amending and supplementing P.L.1938, c. 163 and amending P.L.1962, c. 258. L.1981, c. 230.

Library References
Weights and Measures ⇐11.
C.J.S. Weights and Measures § 7.

56:6-6. Administration; rules and regulations

Administrative Code References
Records required to be kept by retail dealer, see N.J.A.C. 18:19-4.1.

56:4–2. Injunction; damages

Notes of Decisions

Evidence 5

5. Evidence

Brand name drug manufacturers had met their burden of showing that they would be irreparably injured unless injunction issued against generic drug manufacturers' copying of brand name drug's trade dress, and that their remedy at law was inadequate, where it would be impossible to calculate dollar value of sales lost to generic manufacturers in future, damages became even more speculative when lost good will was considered, surreptitious substitution of look-alike generic for brand name product combined with inaccurate label set stage for brand name manufacturers to be blamed for adverse patient reaction or defective medicine even though product was not dispensed, passing off had in fact occurred, and form of "competition" was socially undesirable. Boehringer ingelheim G. m. b. H. v. Pharmadyne Laboratories, D.C., 532 F.Supp. 1040 (1980).

CHAPTER 6. MOTOR FUELS

56:6–2. Posting prices; advertising and sale of motor fuels; rebates, allowances, etc.; lotteries, prizes, etc.; name or trade-mark on above ground equipment

Notes of Decisions

3. Rebates, etc.

A dealer may sell motor fuel to his cash customers at a lower price through a direct deduction in the price at time of sale or by providing customers with redeemable trading stamps, where the payment in cash has a definite and measurable economic value to the retail dealer. ~~Atty.Gen.F.O.1982, No. 2.~~

This section of the Motor Fuel Act forbidding a retail gasoline dealer from giving a rebate or concession to his customers does not apply to the offering of a cash discount to cash sale customers where the cash discount provided approximates the retail dealers saving of credit card costs imposed by the distributor if the customer had purchased by credit card. Id.

56:6–2.1. Price signs to be displayed in accordance with act

Notes of Decisions

1. Regulations

The director of taxation may adopt regulations relating to manner of providing discounts to cash customers of motor fuels, and their conspicuous disclosure, including the posting of price signs. Atty.Gen.F.O.1982, No. 2.

56:6–6. Administration; rules and regulations

Notes of Decisions

1. Rules and regulations

The director of taxation may adopt rules and regulations to define the parameters of an appropriate cash discount. Atty.Gen.F.O.1982, No. 2.

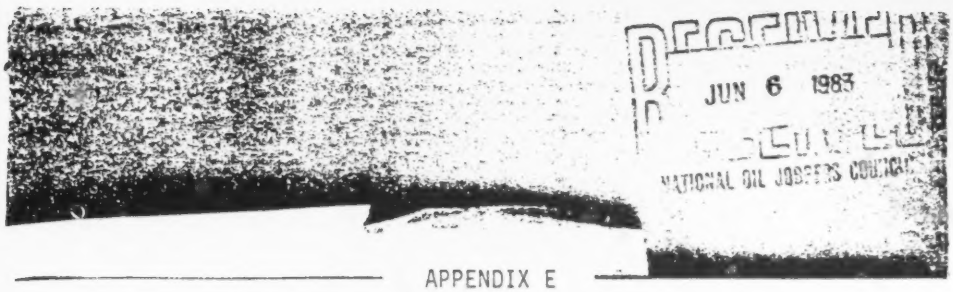
CHAPTER 8. FRAUDS, ETC., IN SALES OR ADVERTISEMENTS OF MERCHANDISE

56:8–1. Definitions

Notes of Decisions

¼. Construction and application

In violating provisions of Door-to-Door Home Repair Sales Act by failing to provide buyer with receipt containing legend informing her of her right to rescind sale and, also, supplying to her a receipt which expressly purported to waive her statutory rights to unilaterally terminate transaction, seller of storm windows and doors for residential dwelling houses violated provisions of Consumer Fraud Act. Swiss v. Williams, 184 N.J.Super. 243, 445 A.2d 486 (Dist.Ct.1982).



APPENDIX E

339-B: 6 **Mixing Fuels of Different Manufacturers.** No person shall mix, blend or compound the liquid fuels, lubricating oils, greases or similar products of a manufacturer or distributor with the products of any other manufacturer or distributor, or adulterate the same, and expose, offer for sale, or sell such mixed, blended or compounded products under the trade name, trademark or name or other distinguishing mark of either of said manufacturer or distributors, or as the unadulterated products of such manufacturer or distributor; provided, however, that nothing herein shall prevent the lawful owner thereof from applying its own trademark, trade name, or symbol to any product or material.

Source. 1971, 404: 1, eff. Aug. 28, 1971.

339-B: 7 **Mixing Fuels of Same Manufacturer.** It is unlawful for any person to mix, blend, compound or adulterate the liquid fuel, lubricating oil, grease, or similar product of a manufacturer or distributor with a liquid fuel, lubricating oil, grease or similar product of the same manufacturer or distributor of a character or nature different from the character or nature of the liquid fuel, lubricating oil, grease or similar product so mixed, blended, compounded or adulterated, and expose for sale, offer for sale, or sell the same as the unadulterated product of such manufacturer or distributor, or as the unadulterated product of any other manufacturer or distributor. Nothing in this chapter shall be construed to prevent the lawful owner of such products from applying his own trademark, trade name or symbol to any product or material.

Source. 1971, 404: 1, eff. Aug. 28, 1971.

339-B: 8 **Gasoline Sales.** It shall be unlawful for any person operating a retail gasoline station to:

I. Display, or allow to be displayed on his premises, any sign, placard, or other advertisement relating to the retail price of gasoline unless numerals thereon indicating fractions or portions of a whole number are at least half the size of the largest whole number on such sign, and no such price of gasoline shall be advertised without the tax included.

II. Post a different price at one pump for the same grade of gasoline as is dispensed from another pump when both pumps are supplied from a common storage at the same service station and when the gasoline dispensed from both is represented to be and is sold as the same quality of gasoline; provided, however, that this paragraph shall not prohibit such price differences between a self-service and an attendant-operated pump supplied from a common storage as described hereinabove.

Source. 1971, 404: 1, eff. Aug. 28, 1971.

339-B: 9 **Conspiracy Prohibited.** No person shall aid or assist any other person in violating any of the provisions of this chapter, by depositing or delivering into any tank, pump, receptacle, or other container, any liquid fuels, lubricating oils, greases or other like products, other than those intended to be stored therein, as indicated by the name of the manufacturer or distributor, or the trademark, trade name, name or other distinguishing mark of the product displayed on the container itself or on the pump or other distributing device used in connection therewith, or shall by any other means aid or assist another in the violation of any of the provisions of this chapter.

Source. 1971, 404: 1, eff. Aug. 28, 1971.

APPENDIX F

THE STATE OF NEW HAMPSHIRE

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January 21, 1983

Stephen H. Taylor, Commissioner
New Hampshire Department of Agriculture
85 Manchester Street
Concord, NH 03301

Dear Commissioner Taylor:

Prior to your recent appointment as Commissioner, the Department of Agriculture and the Mobil Oil Corporation requested this office to reconsider its opinion of May 26, 1982, concerning the applicability of RSA 339-B:8 (Supp. 1981) to the various discount-for-cash programs proposed by the petroleum industry. In that opinion, former Commissioner Townsend was advised that such programs were in violation of RSA 339-B:8,II (Supp. 1981). See Attachment A.

Pursuant to these requests, we have reconsidered the opinion of May 26, 1982. After review of this issue and consideration of the comments of interested parties by the Division of Legal Counsel and the Consumer Protection Division, we have concluded that RSA 339-B:8,II (Supp. 1981) does not prohibit all discount-for-cash programs.

RSA 339-B:8,II (Supp. 1981) provides that it is unlawful to "post a different price at one pump for the same grade of gasoline as is dispensed from another pump when both pumps are supplied from a common storage ... and when the gasoline ... is represented to be and is sold as the same quality of gasoline ...". Legislative history on this statute is scarce; however, it is clear that the law was designed to prevent gasoline station operators from deceiving or misleading retail customers by varying the price of gasoline purely on the basis of the pump from which it is distributed. But see RSA 339-B:3,II (Supp. 1981) (exception for price differentials between self-service and attendant operated pumps).

Obviously, this problem could arise in the context of a discount-for-cash program. If the station operator provides a "cash pump" and a "credit pump," consumers may mistakenly use the wrong pump and be forced to pay the higher price, despite their intention to buy at the discounted cash price. Accordingly, as stated in this office's prior opinion, RSA 339-B:8,II (Supp. 1981) prohibits this type of a discount-for-cash program.

However, RSA 339-B:8,II (Supp. 1981) does not address the practice of varying the price charged for separate sales of gasoline, from the same pump, according to the method of payment. As a result, a discount-for-cash program which involves the posting and charging of one price for the same grade gasoline with a discount provided for customers who pay with cash, if advertised and operated in a manner which is neither deceptive nor misleading, is not prohibited by RSA 339-B:,II (Supp. 1981).

I trust this opinion is responsive to your agency's request. If you have any questions on this matter, do not hesitate to contact me at your convenience.

Very truly yours,

Peter T. Foley

Peter T. Foley
Attorney
Division of Legal Counsel

PTF/gla

THE STATE OF NEW HAMPSHIRE

ATTORNEY GENERAL
GREGORY H. SMITH

DEPUTY ATTORNEY GENERAL
DEBORAH J. COOPER

ATTORNEYS
PAUL BARBADORO
LORETTA S. PLATT
DANIEL J. MULLEN
JAMES D. CAHILL, III
RONALD F. RODGERS
JEFFREY R. HOWARD
G. DANA BISBEE
GREGORY W. SWOPE
PETER T. FOLEY

THE ATTORNEY GENERAL
STATE HOUSE ANNEX
25 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

ASSISTANT ATTORNEYS GENERAL
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ANNE R. CLARKE
MARC R. SCHEER
DONALD J. PERRAULT
RICHARD C. NELSON
JEFFREY R. COHEN
PAUL W. HODES
MARTIN R. JENKINS
PETER W. MOSSEAU
BETSY S. WESTGATE
MARTHA V. GORDON
PETER C. SCOTT
EDWARD L. CROSS, JR.
MICHAEL A. PIGNATELLI
BRIAN T. TUCKER

May 26, 1982

Howard C. Townsend, Commissioner
New Hampshire Department of Agriculture
85 Manchester Street
Concord, New Hampshire 03301

Dear Commissioner Townsend:

Reference is made to your May 14, 1982 memorandum regarding gasoline pricing. That memorandum requests our opinion as to whether State law permits a service station operator to charge different prices for the same grade of gasoline, depending upon whether a customer pays with cash or a credit card. It is our opinion that such a system would be prohibited by RSA 339-B:8,II.

The prohibition against the system you describe is set forth in RSA 339-B:8, entitled "Gasoline Sales". Section II of that statute specifically prohibits any person operating a retail gas station from:

> "Post[ing] a different price at one pump for the same grade of gasoline as is dispensed from another pump when both pumps are supplied from a common storage at the same service station and when the gasoline dispensed from both is represented to be and is sold as the same quality of gasoline..."

The sole exception to the above prohibition is also set forth in Section II of RSA 339-B:8. That statutory section contains an exception which allows service stations to charge a different price for the same grade of gasoline if that gasoline is pumped from both self-service and attendant-operated pumps. In short, the only exception to the prohibition set forth in RSA

Legal Counsel (603) 271-3658
Charitable Trust (603) 271-3591
Antitrust Section (603) 271-3641
(603) 271-3658

Consumer Protection (603) 271-3641
Criminal Justice (603) 271-3671
Eminent Domain (603) 271-3675
Environmental Protection (603) 271-3679
Unemployment Compensation (603) 271-3712

339-B:8,II applies to self-service operated pumps. An additional exception for gasoline purchased with cash cannot be read into the statute.

Finally, your memorandum also references RSA 339:30-a,I. That statute speaks only to the manner in which prices are to be posted, and as such is not relevant to the issue at hand.

Very truly yours,

Jeffrey R. Cohen
Assistant Attorney General
Division of Legal Counsel

JRC:alh
82-48-I

APPENDIX G

NEW JERSEY LAW JOURNAL, THURSDAY, JULY 1, 1982

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Attorney General's Formal Opinion

MOTOR FUEL — CASH DISCOUNT — A motor fuel retailer may provide a discount for the sale of gasoline to cash customers.

May 23, 1982

Sidney Glaser, Director
Division of Taxation
West State and Willow Streets
Trenton, New Jersey 08625

FORMAL OPINION
NO. 2 — 1982

Dear Director Glaser:

You have asked for an opinion as to whether there is any impediment under the Motor Fuel Act to a motor fuel retail dealer establishing one price for gasoline for credit card customers and another lesser price for gasoline for cash customers. For the following reasons it is our opinion that there is no impediment to a motor fuel retain dealer establishing two separate prices for the sale of gasoline, provided any discount to cash sale customers approximates the measurable value of economic benefit accruing to the retailer from the sale being conducted by cash rather than on credit.

Your inquiry has been occasioned by recent decisions made by certain producer — distributors of motor fuels to allocate the cost of credit sales to credit card customers only, rather than allocating such costs among all customers as had been the practice in the past. Most major fuel oil distributors maintain an extensive credit card program whereby card holders may utilize credit cards to purchase motor fuel and other products. In the past, a motor fuel retailer was not charged a fee for participating in the credit card program. Retailers have sold motor fuel to consumers at a single price. In effect, cash consumers have subsidized the cost of extending credit to those consumers who qualify for credit card purchasers. Costs of administration of the credit card program have risen in the past decade. As a consequence, it is proposed that a motor fuel retail dealer will be charged a credit c... processing fee on each credit card transaction. This would presumably reflect the cost of extending credit and administering the credit card program. Each motor fuel retailer will pass its additional cost on its credit card customers and, at the same time, offer a cash discount to those consumers who elect to pay cash for a motor fuel or other products. We are further informed that the typical cash discount provided to a cash customer would approximate the retail dealer's saving of the credit card costs imposed by the distributor if the customer had purchased by credit card.

The New Jersey statute regulating the retail pricing of motor fuel is the Motor Fuel Act, N.J.S.A. 56:6-1 et seq. To achieve the legislative purpose to prevent fraudulent and unfair practices in the retailing of motor fuel, the Act requires the conspicuous posting on pumps of the selling price of motor fuel, including

(Continued on page 15, col. 1)

(Continued from page 3)

taxes; requires that the posted prices remain in effect for 24 hours; and "a retail dealer shall not sell at any other price than the price, including tax, so posted." N.J.S.A. 56:6-2(a). Section (e), most pertinent to your inquiry, then provides that

> No rebates, allowances, concessions or benefits shall be given, directly or indirectly, so as to permit any person to obtain motor fuels from a retail dealer below the posted price or at a net price lower than the posted price applicable at the time of the sale.

Clearly, if the difference in price charged to a credit card and to a cash customer constitutes either a rebate, allowance or concession, the proposal would be interdicted by the statute.

This provision of the Motor Fuel Act forbidding a retail gasoline dealer from giving a rebate or a concession to his customers has been subject to judicial interpretation. *Sperry and Hutchinson Co. v. Margetts*, 15 N.J. 203 (1964); *Glaser v. Downs*, 126 N.J. Super. 10 (App. Div. 1973), cert. den. 64 N.J. 313 (1974). In *Sperry and Hutchinson*, trading stamps were given by retailers to cash customers at the rate of one stamp for each 10¢ of purchased motor fuel. The court held that the offering of a cash discount "is not within the letter of the statutory interdiction, nor would be inimical to the reason and spirit of the act." The court specifically held that the statutory prohibition of "rebates, allowances, concessions or benefits" did not prohibit the true cash discount. The court stated:

> The avowed purpose of this statutory regulation is the prevention, in the public interest, of fraudulent and unfair practices in the retailing of motor fuel. But there is no suggestion in the enactment itself of a design to outlaw the true cash discount as a means to this end. Indeed, its omission from the category of forbidden acts and conduct contained in subdivision (e) makes reasonably clear an intention *contra*. Compare R.S. 56:6-3(a), where the Legislature expressly distinguished between trade discounts and cash discounts. Certain it is that, quite apart from power, we cannot assume from the nature of the expressed policy that the Legislature had in view the interdiction of this well established and commonly known general trade practice of a discount for cash available to all alike." *Sperry*, Id. at 208, 209.

It is important to note that the crucial ingredient of the court's decision was its conclusion that a true cash discount is a discount equated to the value to the dealer of an immediate cash payment.

> "The discount is measured by the economic worth to the merchant of the prompt use of the money and the corresponding reduction in working capital requirements, and the avoidance of the expense of maintaining credit facilities and the inevitable losses from bad debts. Id. at 207.

The Supreme Court reasoned that a discount based on the value of an immediate cash payment "is a term of payment merely, not a price adjustment; it is a mode of financing; not a reduction in the price . . . it does not in any real sense work an inequality of price ... division (e)." Id. at 207, 208.

It is our judgment that the instant proposal does not differ in any material way from the "cash discount" approved by the Supreme Court in *Sperry*. A dealer may sell motor fuel to his cash customers at a lower price either through a direct reduction in the price at the time of sale or by providing customers with redeemable trading stamps. In both instances, the discount is consistent with the act provided that the customer a payment in cash has a definite and measurable economic value to the retail dealer. In this case, we are informed that the retail dealer would save a credit card fee which he would pay to the distributor if the customer purchased by credit card. On the other hand, if the difference in price amounts to more than a genuine cash discount, the proposal would clearly be in contravention of the statutory prohibition against rebates and allowances.

The Director of Taxation has been authorized to promulgate rules and regulations as he may deem necessary to properly implement the Motor Fuel Act, N.J.S.A. 56:6-6. The director may suspend or revoke the license held by any retail dealer for a violation of any of the provisions of the act. N.J.S.A. 56:6-14. Also the grant of express power to the Director is attended by such incidental authority as is fairly and reasonably necessary to make it effective. *See Commerce v. Essex County Park Comm'n.*, 26 N.J. 404, 411 (1958). In light of the need to establish a genuine cash discount to approximate the economic benefit to the retail dealer of providing a discount to cash customers, the Director may adopt rules and regulations to define the parameters of an appropriate cash discount in the motor fuel industry. The Director should consider all the relevant data from major producers or distributors of motor fuels in this state, including the existing trade customers in the industry. Also, the Director may adopt regulations relating to the manner of providing discounts and their conspicuous disclosure, including the posting of price signs. See N.J.S.A. 56:6-2.1 to 2.5. For example, the Director should determine whether the retail dealer should reduce the price at the time of payment to reflect the cash discount or alternatively whether the retail dealer should compute the discount into the "metered" price and sell the gasoline at cash-only pumps.

In conclusion, it is our opinion that there is no statutory impediment under the Motor Fuel Act to a motor fuel retail dealer establishing one price for the sale of gasoline to his credit customers and a separate lower price to its cash customers, provided a discount would approximate the economic value to the retailer of providing a discount to his cash customers.

Irwin I. Kimmelman
Attorney General

1. In *Glaser v. Downs*, *supra*, the Appellate Division of the Superior Court held that the giving of three trading stamps for each purchase of 10¢ of motor fuel did fall within the statutory prohibition. Therefore, while acknowledging the general propriety of the providing of cash discounts, the court concluded a triple stamp program exceeded the permissible cash discount in the trade.

Announcements

Bernard M. Powell and Donald A. Powell have left the firm of Moss, Powell & Powers and have

EXPERT WITNESS
On Employability, Professional Reports and Expert Witness in cases dealing with Personal Injury, Workers' Compensation, Liability, S.S. Disability, etc.
Inquiries Invited— Dr. I. H. Gruber
GRUBER ASSOCIATES INC.

APPENDIX H

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

BUREAU OF
CONSUMER PROTECTION

DEC 16 1982

Mr. Vic Rasheed
Executive Director
Service Station Dealers of America
2021 K Street, N.W., Suite 303
Washington, D.C. 20006

Dear Mr. Rasheed:

This is in response to your letter alleging that Clark Oil Company posts a single price in its service stations on its signs and pumps, and has a small sign which states credit card sales will cost an additional four cents per gallon.

We have obtained information that Clark Oil's pumps are set at cash prices, that street signs reflect cash prices which are noted as such, that pump toppers show both the credit price per gallon and the cash price per gallon, and that for credit card sales, employees add 4¢ per gallon to the cash price reflected on the pump. We have also been informed that Clark Oil & Refining Corp., of Milwaukee, Wisconsin, has been acquired by Apex Oil, located in St. Louis, Missouri.

The Federal Reserve Board, which has rulemaking authority under the Cash Discount Act, recently published amendments to the Federal Reserve Board Official Staff Commentary on Regulation Z. Section 226.4(b)(9)-3 of that Commentary, which contains guidance concerning the determination of "regular price" under the Cash Discount Act, states in part, that:

> For example in the sale of motor vehicle fuel, the tagged or posted price is the price displayed at the pump. As a result, the higher price (the open-end credit or credit card price) must be displayed at the pump, either alone or along with the cash price. Service station operators may designate separate pumps or separate islands as being for either cash or credit purchases and display only the appropriate prices at the various pumps. If a pump is capable of displaying on its meter either a cash price or a credit price depending upon the consumer's means of payment, both the cash price and the credit price must be displayed at the pump.

The Federal Reserve Board Commentary does not state that the credit card price, rather than the cash price, must be metered on the pump in situations where both cash and credit sales are made from a single pump. There has been no definitive statement from the Federal Reserve Board or its staff, that it would violate the law to reflect only the cash price on the pump mechanism, when both the cash price per gallon and credit card price per gallon are reflected on pump toppers at the pump. As indicated above, information we have received indicates Clark's pump toppers do reflect these prices.

For your information, you should be aware that violations of the provisions of the Cash Discount Act or other provisions of the TILA may be subject to civil liability to consumers who sue and prove violations of the TILA in transactions involving them. Opinions of the Federal Trade Commission or its staff do not offer any protection from such liability.

If you have information that Clark's practices are other than as described above, please notify us. The views in this letter are staff opinion which is advisory in nature and not binding upon the Commission. Thank you for bringing this matter to my attention.

Sincerely,

David G. Grimes, Jr., Attorney
Division of Credit Practices

APPENDIX I

IEL MERCHANTS ASSOCIATION OF NEW JERSEY

GASOLINE JOBBERS DIVISION

FRAN HAVILAND
EXECUTIVE DIRECTOR
201 - 379-1100

68 MORRIS AVENUE
P. O. BOX 359
SPRINGFIELD, N. J. 07081

State of New Jersey

DEPT. OF LAW AND PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS
OFFICE OF WEIGHTS AND MEASURES
187 WEST HANOVER ST.
TRENTON, N.J. 08625

IRWIN I. KIMMELMAN
ATTORNEY GENERAL

JAMES J. BARRY, JR.
DIRECTOR

MAR 9

February 9, 1983

TO ALL STATE, COUNTY, & MUN. WTS. & MEAS. OFFICERS:

SUBJECT: Gas Station - Cash Discounts, N.J.S.A. 56:6-1 et seq. and N.J.A.C. 18:19-1 et seq.

In an effort to clear up any misunderstanding regarding enforcement of the above captioned statute and regulation, we have met with Mr. Gerald Ferrara, Executive Director of the New Jersey Gasoline Retailers Association, to discuss what our enforcement policy will be. Listed below are the guidelines to be followed:

1. All gasoline pumps will show the posted price per gallon and/or liter at the higher or credit card price. A sign disclosing the cents-off per gallon discount may be shown at the pump or at the island site. The lower cash price may be posted on a street sign or some other sign not in close proximity to the pumps themselves. This sign shall be accessible to the public.

2. Separate islands for cash and/or credit may be used provided that the pump posted signs and computer prices on both the cash island and credit card island reflect the higher credit card price.

3. Price signs for blending pumps must indicate the highest and lowest blend dispensed and the "credit card" price for the respective blends. A sign must be posted on the premises, in clear view, to the public listing all blends and prices available at the station.

4. There is no longer a minimum size for the numbers required on the price signs. However, the signs themselves will measure not less than 5½" x 8" nor greater than 12" x 12" and to be visible from both sides of the pump.

5. Giving gas instead of cash will be considered an acceptable practice.

I am requesting that you disseminate this information to all service stations in your respective jurisdictions, by giving them a copy of this bulletin. An inspection report should be made out and kept on file indicating that this has been done.

Thomas W. Kelly
State Superintendent

TWK:jae

cc Director James J. Barry, Jr., Division of Consumer Affairs
Executive Director Gerald Ferrara, NJ Gasoline Retailers Association

APPENDIX J

DR. KENNETH B. CREER
COMMISSIONER

State of Utah
Department of Agriculture
Salt Lake City, Utah 84103

533-5421
AREA CODE 801

MEMORANDUM

TO: Jerry Tedrow DATE: May 27, 1982

FROM: Intermountain Oil Marketer's Ass.

SUBJECT: Edison J. Stephens, Supervisor, Weights & Measures Section, Dept. of Ag.
Two Pricing Sales of Gasoline

This office has received several inquiries into the legality of offering gasoline for sale at a discount rate for cash sales or charging more for credit card sales. There is a Federal Banking (truth in lending regulation) which prohibits charging for credit, but does allow discounts for cash.

Utah Weights & Measures Statute provides for full disclosure when offering for sale or selling products. Under 4-9-12 - It is unlawful for any person to: (2) Misrepresent the price of any commodity sold, advertised, or offered for sale by weight, measure or count, or to represent the price in any manner tending to mislead or deceive a person.

If industry feels an urgency for two pricing, this office would recommend the following format in order to have uniformity throughout the state: (1) The cash discount price would be shown on roadside signs and would be labeled "cash discount price". (2) The dispenser would be set to compute this price. (3) Adequate signs on top of dispenser would reflect the following information:

Sample

all sales will be computed at cash discount price. Credit card sales will be computed at cashiers window

REGULAR GASOLINE

Credit Card Price	Cash Discount Price
$ 1.159 Per Gal.	$ 1.119 Per Gal.

Cash discount price not available to credit card purchaser

APPENDIX K

REQUEST FOR ISSUANCE OF STATEMENT
CONCERNING PRACTICES AUTHORIZED UNDER
THE CASH DISCOUNT ACT (P.L. 97-25)

PREFACE

The National Oil Jobbers Council is a federation of 46 state and regional trade associations representing thousands of independent small business petroleum marketers. Members include gasoline and diesel fuel wholesalers, commissioned distributors of gasoline, gasoline reseller-retailers and a large number of retail fuel oil dealers. Members also wholesale or retail many other petroleum products, including kerosene, LP gas, aviation fuels and motor oils as well as residual fuel oil. Together our members market approximately 50 percent of the gasoline and 90 percent of the home heating oils sold in America under either their own private brand or the trademark of their supplier.

Pursuant to 15 U.S.C. Section 57b-4(d) (the Jepsen amendment), the National Oil Jobbers Council (NOJC) hereby requests the Board of Governors of the Federal Reserve System (Board) to issue a statement regarding the permissibility under the Cash Discount Act (P.L. 97-25, July 27, 1981) of the following acts and practices:

Assuming that retail gasoline outlet islands and pumps are clearly and conspicuously labeled so as to fully disclose to consumers the price to be charged for each grade and type of motor fuel:

(1) May motor fuel marketers post a cash price on a street sign in addition to the "regular" price?
(2) May the cash price be the only price posted at the street?
(3) May marketers limit full serve islands to credit, and self serve islands to cash?
(4) May the price appearing on the pump meter be the price charged for cash sales?
(5) If the Board does not promulgate rules or issue a statement under the Cash Discount Act, what enforcement responsibilities has the Federal Trade Commission?

Jurisdiction

The NOJC is a non-profit corporation representing approximately 18,000 independent marketers of petroleum products through their membership in our 46 state and regional associations. While the terms of the Act affect all of our members, the confusion regarding the Act's intent and applicability currently arises primarily in the sale of motor fuels to consumers. Roughly two-thirds of all gallons marketed by NOJC members are motor fuels.

According to 12 CFR Section 226.1, the Board has rulemaking authority under the Act, while the Federal Trade Commission has enforcement responsibilities.

Under these circumstances, the Board is required by the Jepsen amendment to dispose of NOJC's request for a statement or interpretation concerning the permissibility under the Cash Discount Act of the aforementioned practices as soon as possible. The Jepsen amendment states:

> "If in any case in which --
> (1) the Board of Governors has rulemaking authority with respect to any Federal law; and
> (2) the Commission is authorized to enforce the requirements of such Federal law;
> any person, partnership, or corporation submits a request to the Board of Governors for the issuance of any statement of interpretation or statement of approval relating to any conduct or practice of such person, partnership, or corporation which may be subject to the requirements of such Federal law, then the Board of Governors shall dispose of such request as soon as practicable after the receipt of such request."

Background and Statement of the Problem

In passing the Cash Discount Act, which amended Section 167(b) of the Truth in Lending Act, the Congress eliminated the 5% ceiling on cash discounts and extended the prohibition on credit card surcharges through February 26, 1982. The Act's explicitly stated purpose was "to encourage cash discounts". Over the last six months, however, the offering on a large scale of cash discounts in the retail motor fuels market has not occurred. This primarily is due to the fact that a great deal of confusion exists regarding what constitutes permissible practices under the Cash Discount Act. In NOJC's view, the confusion is a result of three factors:

(1) The Cash Discount Act's obscure definition of regular price and its failure to define posted price;

(2) The Cash Discount Act's nullification of previous regulations implementing Section 167(b) of the Truth in Lending Act and the failure of the Board to issue new written guidelines;

(3) The existence of state laws that set inconsistent standards compared to those established under the Cash Discount Act.

Discussion

A. The Cash Discount Act

The sections of the Cash Discount Act in question here read as follows:

> Sec. 101. Section 167(b) of the Truth in Lending Act (15 U.S.C. 1666f(b) is amended to read as follows:
>
> "(b) With respect to any sales transaction, any discount from the regular price offered by the seller for the purpose of inducing payment by cash, checks, or other means not involving the use of an open-end credit plan or a credit card shall not constitute a finance charge as determined under section 106 if such discount is offered to all prospective buyers and its availability is disclosed clearly and conspicuously."
>
> Sec. 102.(a) Section 103 of the Truth in Lending Act (15 U.S.C. 1602) is amended by adding at the end thereof the following:
>
> "(z) As used in this section and section 167, the term 'regular price' means the tag or posted price charged for the property or service when payment is made by use of an open-end credit plan or a credit card if either (1) no price is tagged or posted, or (2) two prices are tagged or posted, one of which is charged when payment is made by use of an open-end credit plan or credit card and the other when payment is made by use of cash, check or similar means..." (emphasis added)

The ultimate question, of course, is what constitutes a tag or posted price? At a typical retail motor fuels outlet, product prices may be displayed in a number of ways -- on an overhead advertising sign and price card, a ground level sign at the curb, on the pump meter, on a "pump topper", or by the use of a combination of these methods. Motor fuel outlets generally sell a minimum of two types of product (by law marketers are required to offer both leaded and unleaded gasoline), and consequently at least two prices are posted. Furthermore, motor fuel outlets are extremely diverse in terms of equipment and method of operation. Outlets equipped to sell motor fuels range from the small "mom and pop" store with two pumps selling unleaded and leaded gasoline, to convenience stores with one island, to larger outlets offering several grades and types of product, including regular gasoline, premium gasoline, diesel and gasohol at several pump islands, to the largest self-serve "super-pumpers" (with as many as 20 different pumps).

Although the vast majority of marketers have expressed an interest in offering cash discounts, most are unwilling to do so because of the lack of a clear definition of "posted price". The larger and more sophisticated outlets encounter the greatest problems, as they may have several full service and self service islands, with eight to nine dispenser pumps and two hoses per pump -- and a correspondingly large number of prices posted. Small outlets with only one island encounter problems as well, as they do not have the same flexibility as the larger operations. Regardless of size or sophistication, however, few marketers are willing to offer cash discounts when to do so could place them in the position of violating a federal law that fails to give adequate notice of what is required of them.

2. Failure of the Board to Issue new Guidelines.

Section 103 of the Cash Discount Act declared that "[a]ny rule or regulation of the Board of Governors of the Federal Reserve System pursuant to section 167(b) of the Truth in Lending Act, as such section was in effect on the day before the date of enactment of this Act, is null and void."

While NOJC has no strong objection to the nullification of these now outdated regulations, the fact that no new rules, guidelines or statements of public policy have been issued to implement the Cash Discount Act further complicates the problems created by the vague language contained in the Act itself.

Although to date Board employees have been cooperative in providing to NOJC oral guidelines as to what is and is not permissible, so far these officials have refused to confirm this advice in writing. Generally speaking, these sources have indicated that as long as pumps and islands are clearly marked, and prices are fully disclosed to the consumer, the cash discount law will not be violated. This leaves marketers with no specific written guidelines to fall back on in the event of a consumer complaint, however.

The express intent of Congress to encourage cash discounts will not be served unless marketers are given adequate notice as to what the law requires. In issuing a statement concerning what constitutes permissible practices under the Act, the Board will be acting in the public interest in ensuring that the intent of Congress is carried out. NOJC believes that in keeping with the Administration's commitment to lessen the regulatory burden on private industry, and small businesses in particular, the language of the Cash Discount Act should be broadly construed in any interpretation issued by the Board.

3. Inconsistent State Laws and Local Ordinances.

NOJC has not conducted an extensive survey of state laws and local ordinances governing cash discounts and surcharges and therefore is unaware of the extent to which inconsistencies and confusion exist nationwide. However, we are aware of several specific state statutes and ordinances that would appear to conflict with the federal law or with verbal guidance provided by Board officials. For example, state law in North Carolina permits a marketer to advertise a cash discount rate. However, the cash price may not be entered in the pump meter --

the meter must reflect only the credit card price. This presents a problem in terms of maintaining good relations with cash customers. One of the reasons consumers use cash to purchase a product is because a cash transaction usually involves less delay than a credit card transaction. If a cash paying customer must wait while an attendant calculates his or her discount from a total based upon the credit card price, then this incentive to pay cash is lost. Additionally, a requirement that the pump meter reflect only the credit card price could be an inducement to dishonest attendants to charge the cash paying customer the price reflected on the meter and pocket the discount. Since there would be no way for the marketers to differentiate between cash and credit sales because pump totals and receipts would agree, such a ruse would be difficult if not impossible to detect.

Since Congressional intent was to encourage cash discounts, NOJC believes that cash transactions should be facilitated. The Board can accomplish this end by issuing a strong public policy statement that guarantees full disclosure to the consumer and gives marketers maximum flexibility under the law to provide their customers with the quick, convenient and safe service they seek. While this policy may not necessarily be considered binding on state and local entities, it would provide them with guidance as to what practices, in the Board's view, the Cash Discount Act permits. Many states presently are relying on their own interpretations of the Cash Discount Act, which appear to be in conflict with stated Board policy. See attached Virginia Department of Agriculture and Consumer Services Guideline Number 11 which proniait "[a]dvertising signs that state only the cash price...".

In summary, although NOJC members cannot generally be said to be in favor of government regulation of their businesses, the unique set of circumstances involving a vague federal statute combined with the lack of any regulatory interpretation and inconsistent state laws has resulted in a chaotic situation in the marketplace. If Congressional intent is to be carried out, the Board must address the questions raised in this petition with a view towards granting jobbers maximum flexibility under the Cash Discount Act.

Respectfully submitted,

Barbara Faulkner

Barbara Faulkner
General Counsel

DOUGLAS R. CARLSON
ASSISTANT ATTORNEY GENERAL IN CHARGE
CONSUMER PROTECTION DIVISION
KATHRYN L. GRAF
ASSISTANT ATTORNEY GENERAL
FRANK THOMAS
ASSISTANT ATTORNEY GENERAL
CRAIG S. BRENNEISE
ASSISTANT ATTORNEY GENERAL
LINDA THOMAS LOWE
ASSISTANT ATTORNEY GENERAL

APPENDIX L

Department of Justice
THOMAS J. MILLER
ATTORNEY GENERAL

ADDRESS REPLY TO:
CONSUMER PROTECTION DIVISION
HOOVER BLDG., SECOND FLOOR
1300 EAST WALNUT
DES MOINES, IOWA 50319
515/281-5926

November 5, 1982

Mr. Gerald Hurst, Atty.
Div. of Consumer &
Community Affairs
Board of Governors of
the Federal Reserve
20th & "C" Streets, N.W.
Washington, DC 20551

Dear Mr. Hurst:

This office, as Administrator of the Iowa Consumer Credit Code, enforces the federal Truth-In-Lending Act disclosure provisions for the State of Iowa. As Administrator of the Iowa Consumer Credit Code, we have recently been presented with a question concerning the interpretation of the latest Board commentary on Regulation Z, § 226.4(b)(9)-3. The question presented is whether, under the Truth-In-Lending Act as amended by the Cash Discount Act of 1981, a petroleum retailer who offers a "discount for cash," is imposing a "surcharge" on a consumer who pays by credit card when only the cash price is metered on the pump. The question assumes that:

1. The retailer has posted both the cash and credit price at the pump;

2. That the retailer does not use separate cash and credit islands; and,

3. That the retailer does not use pumps which are capable of metering both the cash and credit price simultaneously (dual read-out pumps).

The staff commentary effective September 17, 1982, which address the matter of cash discounts in the sale of motor vehicle fuel did not answer the question presented in this letter. Accordingly, until the Board clarifies its position on this question, this office, based on a careful study of the matter, will conclude that metering the cash discount price when

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Date Due

the consumer pays by means of a credit card constitutes a "surcharge" and is a violation of federal Truth-In-Lending disclosure provisions as incorporated by reference in the Iowa Consumer Credit Code.

The purpose of this letter is to request a written reply from your office on this question. Certain petroleum retailers in Iowa have advised this office that they plan to use the approach of metering the cash discount price; however, these same retailers also wish to be in compliance with truth-in-lending disclosure requirements and therefore they have not yet instituted this approach in their stations within the State of Iowa. This office would appreciate your written response on this matter which at the very least should acknowledge whether the question was left unresolved by the September 17, 1982, commentary and which also should state whether and when the Board staff intends to address the issue. As I am sure you realize, unless Congress allows the surcharge provision to sunset in February, 1984, this question will persist.

A regulatory hearing related to this issue is scheduled in Des Moines for December 16, 1982, and accordingly this office would greatly appreciate a reply prior to that time.

Sincerely,

Linda T. Lowe

LINDA THOMAS LOWE
Assistant Attorney General

cc: Mr. John Davis
Total Petroleum
514 East Locust
Scandia Building
Des Moines, IA 50309

Mr. John Fletcher
Pester
P. O. Box 10006
Des Moines, IA 50306

Mr. E. K. Kistinmacher
P. O. Box 6156
Des Moines, IA 50309

December 3, 1982

Linda Thomas Lowe
Assistant Attorney General
Consumer Protection Division
Hoover Building, Second Floor
1300 East Walnut
Des Moines, Iowa 50319

Dear Ms. Lowe:

In your November 5 letter to Mr. Hurst of our staff, you asked for clarification of § 226.4(b)(9)-3 of the Official Staff Commentary to Regulation Z. Specifically, you ask about the staff's position with respect to the price to be displayed on the pump meter by a petroleum retailer who offers a "discount for cash."

We have been asked previously to address the issue of whether a retailer may set the pump meter at the cash price if the credit card price is also clearly and conspicuously disclosed at the pump as a method of offering a cash discount. Because of the legislative history to the Cash Discount Act we do not think it is appropriate for us to issue opinions on this type of question.

When it revised the cash discount provisions of the Truth in Lending Act in 1981, Congress took two actions to limit the complexity of the regulatory requirements in this area. It voided the Board's existing regulations and interpretations concerning cash discounts and it deleted the language "in accordance with regulations of the Board" from the previous provisions requiring clear and conspicuous disclosure of the availability of discounts. The legislative history of these amendments makes clear that Congress wanted to limit regulations to those absolutely necessary to implement the law. (I have enclosed a copy of the Senate Report for your convenience.) Because of this congressional intent we have tried to keep our involvement in the cash discount area to a minimum. Although we have issued some guidance in the staff commentary, we believe that beyond a certain point the application of the statute to particular practices will have to be judged by counsel and their clients. Our current thinking is that this question falls within this category.

I hope you can understand the position we have taken. If you would like to discuss this matter further or have additional questions, please contact Mr. Hurst at (202)452-3667.

Sincerely,

Griffith L. Garwood
Director

GPH:aem
12/3/82
RS-20508

Enclosure

APPENDIX M

Marketers Report

The Texas Oil Marketers Association
701 WEST 15TH STREET, AUSTIN, TEXAS 78701 512/476-9547

November 16, 1981

Message from President Perry N. Bolin

Retail prices have reached unrealistically low levels . . . accounts receivables are at an all time high . . . problems and priorities have shifted as a result of decontrol!

TOMA has always been well known for its ability to shift with the times and work in the areas that are of the most importance to our members.

But, for TOMA to establish its priorities for 1982, WE NEED YOUR HELP!

In the next week or so, a TOMA membership survey will be sent to you. It appears lengthy, but will only take a few minutes to complete.

Please take the time to answer the survey and return it as soon as possible. You will find there are numerous programs and projects that the Association is considering pursuing on your behalf. Tell us which ones you want!

INDUSTRY NEWS OF INTEREST TO MARKETERS

Marketers Can Offer Separate Credit And Cash Islands!--

Legal Counsel for the Federal Reserve Board in Washington has informed the Texas Oil Marketers Association that gasoline outlets can post the price on certain pumps for cash and on other pumps for credit without violating the Truth in Lending Act.

Previously, it was believed that itwould be illegal for a marketer to offer a pump with a cash price and another pump with a credit card price. Sources at the Federal Reserve Board state that as long as the islands or pumps are clearly marked in order that the customer will know exactly which island is cash and which should be used when he desires to use a credit card, the Truthin Lending regulations will not be violated. The Federal Reserve officials will not put this interpretation in writing, therefore, members should be aware that in the event of a consumer complaint, they will not have specific guidelines to follow or to refer to.

This ruling now gives Texaco marketers the option of utilizing separate pumps for credit card sales, whereby the pump would reflect the higher costs involved, and they would be passed on directly to the customer.

There have been reports that certain service stations have been assessing a surcharge on invoices for credit card sales. For instance, a customer drives into a service station and purchases $10 of gasoline at $1.25 for a total of $12.50. The service station dealer then assesses a 4% credit card fee and records on the invoice a $13 charge. This would be illegal under federal regulations.

The most important point to remember is that marketers should clearly and conspicuously notify customers what they are doing. They should have signs which specify whether or not a pump or pump island is for cash or credit. Marketers would be permitted to post the cash price on a street sign

as long as the sign includes the words "CASH PRICE".

Marketers who have any questions on how to comply with the Federal Truth in Lending Act can contact Jerry Hurst at the Federal Reserve Board in Washington, D.C., 202-452-2087.

SPECIAL PURCHASE PROGRAM: TOMA members who would like to utilize separate pumps or islands for credit and cash prices can purchase sign equipment at a group discount. TOMA Associate members May Advertising and Creative Products will both offer a discount to TOMA members purchasing these signs. For information, contact: Jack England, May Advertising Corp., (817) 336-5671 or Nelson Mason, Creative Products Inter., (813) 839-6356. Be sure and specify that you are a TOMA member.

Major Oil Companies Announce Earnings--

Third quarter earnings and revenues for major oil companies where rather mixed, with many showing significant reductions in earnings compared to a year ago.

The following is the percentage change in revenues for major oil companies for the third quarter in 1981, compared to the same period in 1980:

Exxon, -20.7; Mobil, -30; Texaco, -7.3; Standard of California, -15.5; Phillips, -32.1; Amerada Hess, -53.7; and Cities Service, -16.1.

Those refiners who showed an increase in revenues include:

Gulf, +30; Standard of Indiana, +35.5; Atlantic Richfield, +11.2; Shell, +33.4; DuPont, +209 (DuPont figures reflect its recent merger with Conoco, Inc. which Dupont said accounted for $3.48 billion of its increase in its revenues and $114 million of its third quarter net income); Sun, +9; Standard of Ohio, +8; Getty, +7; Union, +58.2; Marathon, +92; and Ashland, +39.7.

Conoco Reiterates Merger Won't Change Operations--

Conoco North American Marketing Vice President Don Clark was recently interviewed by Conoco's "Today" newsletter, and stated the following on what effect the Conoco-Du Pont merger would have on petroleum marketing operations:

"We have been assured that we will continue to operate as a separate identity, maintaining the Conoco brand with an opportunity for continued growth in marketing where we can demonstrate an acceptable return on our investment...since DuPont's feedstock requirements presently are tied to existing contracts, we will not experience any shortage of petroleum products for the dealer. As these contracts expire, DuPont naturally will not look to Conoco for supplies, but their feedstock requirements are primarily in natural gas and perhaps coal for the future. Therefore, we do not anticipate any shortage for jobbers and dealers."

BC-GASOLINE 5-10 APPENDIX N

BY ROZ LISTON

UPI BUSINESS WRITER

NEW YORK (UPI) -- THE MAJOR OIL COMPANIES' DISCOUNTS FOR MOTORISTS WHO PAY CASH AT THE PUMP HAVE MADE INDEPENDENT GASOLINE MARKETERS LESS PRICE COMPETITIVE, A NORTH CAROLINA DISTRIBUTOR SAID TUESDAY.

"THE DISCOUNT-FOR-CASH PROGRAM HAS DONE MORE TO DESTROY THE CREDIT CARD CUSTOMER IN SIX MONTHS THAN ANYTHING THE MAJORS HAVE UNDERTAKEN IN 25 YEARS," CECIL WORSLEY OF WORSLEY ENTERPRISES IN WILMINGTON, N.C., TOLD A SEMINAR AT THE NATIONAL OIL JOBBERS COUNCIL'S SPRING CONVENTION.

WORSLEY, WHOSE COMPANY IS A MULTI-BRAND SUPPLIER FOR SEVERAL MAJOR OIL COMPANIES, SAID INDEPENDENTS THAT SELL GASOLINE ON A CASH ONLY BASIS WERE ABLE TO UNDERPRICE THE INDUSTRY GIANTS BEFORE THE DISCOUNT-FOR-CASH PROGRAMS.

BUT MANY MAJORS THAT ADOPTED DISCOUNTS FOR CASH TO BOLSTER SALES NOW OFFER LOWER PRICES THAN INDEPENDENTS WHO MARKET PRIVATE BRAND GASOLINE, HE SAID.

INDEPENDENT MARKETERS ACCOUNTED FOR 33.1 PERCENT OF ALL GASOLINE SALES IN 1982 VS. A 66.9 PERCENT SHARE FOR MAJOR OIL COMPANIES, ACCORDING TO THE LOS ANGELES-BASED LUNDBERG LETTER THAT TRACKS THE GASOLINE MARKET.

WORSELY POINTED OUT THAT BRAND LOYALTY HAS DECLINED DRAMATICALLY AND PRICE IS THE OVERRIDING FACTOR IN MOTORISTS' BUYING DECISIONS.

HE SAID THE MAJOR OIL COMPANIES MOVED INTO DISCOUNTS FOR CASH AND CREDIT CARD INCENTIVES TO IMPROVE THEIR OWN OPERATIONS AT THE EXPENSE OF THE INDEPENDENTS.

"THE MAJORS ARE LOOKING TOTALLY ON THEMSELVES AND WILL DESTROY THE JOBBERS (INDEPENDENT MARKETERS)," HE SAID.

DAN LUNDBERG, THE LUNDBERG LETTER PUBLISHER WHO MODERATED THE SEMINAR, SAID THERE WAS SOME SUGGESTION THAT SUPPLIES OF GASOLINE AND OTHER REFINED PETROLEUM PRODUCTS WERE BECOMING TIGHT.

SEVERAL NJOC MEMBERS IN THE AUDIENCE COMPLAINED OF SPOT GASOLINE SHORTAGES IN THEIR AREAS.

EDWARD PIKE, A REGIONAL MARKETING MANAGER FOR MARATHON OIL CO., SAID A TEMPORARY "DISLOCATION" OF GASOLINE SUPPLIES OCCURRED 30 OR 40 DAYS AGO BECAUSE LARGER USERS TOPPED OFF THEIR TANKS TO BEAT THE 5 CENT-A-GALLON INCREASE IN THE FEDERAL GASOLINE TAX THAT TOOK EFFECT APRIL 1.

MARATHON SOLD TWICE AS MUCH GASOLINE IN MARCH AS IT HAD A YEAR EARLIER, HE SAID. THE COMPANY'S POSTED GASOLINE PRICE DROPPED IN MARCH TO ITS LOWEST POINT THIS YEAR.

"WE SEE NOTHING TO PREVENT US FROM MEETING THE DEMANDS OF THE MARKETPLACE -- SHORT OF AN INTERNATIONAL CRISIS," PIKE SAID.

UPI 05-10-83 03:49 PED

Attachment 4

THE NEW YORK TIMES, MONDAY, NOVEMBER 1, 1982

The New York Times/Sara Krulwich

A Shell service station at 48th Avenue and Queens Boulevard, one of many engaging in competitive pricing and unusual purchase offers.

The New Pricing War At the Gasoline Pumps

Selling a gallon of gasoline has always been a highly competitive game. These days, in a time of weakened demand for gasoline and a deregulated marketplace, that competition — and the confusion it has engendered — may be more intense than ever.

In this most recent version of the gasoline price war, some oil companies are trying to trim costs associated with credit card transactions by offering discounts for using cash or discontinuing their card programs. Others are sticking by their plastic and, in fact, are accepting their competitors' gasoline cards.

"Price," said George Babikian, senior vice president of marketing at the Atlantic Richfield Company, "is the single most important ingredient in the marketing of gasoline today. A penny a gallon at critical price levels makes a whale of a difference."

The wide variety of pricing options at service stations — cash, credit card, full-service and self-service for each type of gas — has left many customers befuddled and has irked service station operators.

A two-mile strip of Queens Boulevard in New York City offers an idea of the motorist's quandary: there's the Texaco station that sells unleaded gas for $1.399 a gallon if bought with cash, $1.449 a gallon if purchased at a special credit card pump. Or a driver might try the Amoco station down the block. There, unleaded gas sells for $1.349 a gallon for cash and 5 cents more with a credit card. Then there's the Shell station that welcomes any oil company credit card and offers the same price for cash or credit.

Competition in gasoline marketing was revived in January 1981 when President Reagan lifted price controls. Deregulation, combined with declining demand and excess supplies, has

Continued on Page D6

oil companies in a scramble to keep from losing market share. Between 1978 and 1981, demand for gasoline dropped more than 13 percent, from 7.6 million barrels daily to 6.6 million.

Maintaining credit card service for customers has become a costly venture, some oil companies say. A few have decided to compete for the cash-paying public that accounts for about 70 percent of sales. The companies are doing it by ending, or at least reducing, the subsidy cash customers have traditionally paid to sustain credit operations.

Toward that end, Atlantic Richfield took the offensive on April 15 and ended its credit card operations. Termination of its credit system, which in 1981 cost the company $73 million, enabled Arco to reduce its gasoline price by about 3 cents a gallon.

In response, other oil companies fired their own salvos. Mobil offered to accept Arco cards in an attempt to attract customers. Exxon, Amoco and others instituted a discount-for-cash option. And Shell, deciding to woo the outcast credit card customers, took out full-page advertisements welcoming any oil company credit card at its stations until Nov. 30. In addition, Shell has kept gas prices the same for credit and cash customers. The Sun Company later followed Shell's lead.

Service station dealers say they are caught in the middle. Oil companies offering "discounts for cash" typically reduce the price of wholesale gas to their dealers, but they also charge a fee for any credit tickets the dealers turn in. Dealers say their profit margin has been squeezed because they are now charged for credit purchases and must reduce cash prices to the customer by as much as 5 cents a gallon to stay competitive.

As a result, what is advertised as a discount for cash is really a surcharge for credit, a practice that is illegal, according to Vic Rasheed, executive director of the Service Station Dealers of America.

"The consumer is under the illusion he is saving money by paying cash for gasoline at a station having a two-price system when, in fact, he is paying more than he would pay for the same gasoline at competing stations," according to a complaint filed with the Federal Trade Commission by the Service Station Dealers group, which represents 60,000 gas dealers.

The F.T.C. is investigating the complaint.

"There is certainly a violation if there is no listing of the two prices at the pumps," said David Grimes, a lawyer at the commission's Bureau of Consumer Protection. It is unclear, however, whether there is a violation where there are two prices posted on the pump, one for cash and one for credit, but only the cash price shows on the pump meter. "That's an area where it gets somewhat muddy," Mr. Grimes said.

The consumer may have a hard time finding the best price.

At service stations in the New York area, most dealers have both prices listed on the pumps, but comparing prices from the street is impossible. One Texaco dealer admitted that the new cash price was the same as before the split-price policy was begun, and the credit price was really a surcharge.

"Because Texaco charges us more, we have to increase the credit price just to stay even," the dealer explained.

Mike Kang, who manages an Amoco station in Queens, said his sales had dropped 20 percent since the dual-price policy was started. "It used to be that we had $1,000 a day in credit card sales," Mr. Kang said. "Now we have $100 a day." Mr. Kang said he discouraged motorists from buying with credit cards by opening only one pump for those sales.

Atlantic Richfield executives had considered the discount-for-cash option, according to Mr. Babikian, but rejected it because it was seen as confusing to the public and it could recover only half of the cost of continuing its credit system.

Recently, the Getty Oil Corporation and the Pennzoil Company said they, too, would end their credit card programs.

Christopher Klersted, a spokesman for Texaco, which has retained its credit card program but charges its dealers for credit sales, said oil company maneuvering is "an entrepreneurial response" to deregulation of the industry. "Each one is coming up with a different way to meet the competitive pressure," he added.

Shell and Sun are the only companies so far that encourage credit sales. William Bittles, vice president of retail sales for Shell, said the company hoped to reduce unit costs for its credit service by broadening the credit base. "We saw this as an opportunity to bring in new credit card business" while other companies were ending credit programs or charging for it, Mr. Bittle said.

Who is winning the competition? It's too early to tell, but Arco seems to have made an initial gain by dropping its credit system and lowering its prices. The company reports gas sales are up 50 percent from a year ago.

In discussing the impact of the Shell policy on other oil companies, Mr. Rasheed said, "I would not be surprised if they don't drop the fees because of the economic pressures. Otherwise they face losing the credit card business to Shell."

Attachment 5

D R A F T

AN ACT

To amend the Truth-in-Lending Act to continue the ban on credit card surcharges while allowing assessment of a participation fee.

Be it enacted by the Senate and House of Representatives of the United States in Congress assembled, that this Act may be cited as the "Truth-in-Lending Amendment Act of 1983."

Sec. 101 - Sec. 103(q) of the Truth-in-Lending Act is amended to read as follows:

> (q) The term "surcharge" as used in section 103 and section 167 means any means of increasing the regular price to a cardholder, which is imposed by the retail seller, and which is not imposed upon customers paying by cash, check or similar means.

Sec. 102 - Sec. 103 of the Truth-in-Lending Act is amended by adding a new section (aa) as follows:

> (aa) The term "participation fee" shall mean a charge which is assessed against the cardholder by the card issuer as either or both an annual fee for participation in the card issuer's credit card program, or as a transaction fee assessed for each use of a credit card.

Sec. 103 - Sec. 106(d) of the Truth-in-Lending Act is amended by adding a new subsection 106(d)(3) as follows:

> (3) A participation fee, as defined in Sec. 103(aa), provided the card issuer has disclosed to the cardholder prior to the imposition of the fee, the amount, or the method of calculating the amount of, such fee.

Sec. 104 - Sec. 201 of Public Law 97-25 is amended to read as follows:

"Sec. 167(a)(2) of the Truth-in-Lending Act [15 U.S.C. 1666f(a)] shall cease to be effective February 27, 1987.

Sec. 105 - Sec. 171(c) of the Truth-in-Lending Act is amended to read as follows:

Notwithstanding any other provisions of this title, any discount offered under section 167(b) of this title, or any participation fee assessed under section 106(d)(3) of this title shall not be considered a finance charge or other charge for credit under the usury laws of any State or under the laws of any State relating to disclosure of information in connection with credit transactions, or relating to the types, amounts or rates of charges, or to any element or elements of charges permissible under such laws in connection with the extension or use of credit.

Sec. 201 - This Act shall have an effective date of February 28, 1984.

Attachment 6

njc

Comments of
THE NATIONAL OIL JOBBERS COUNCIL

Presented to the
Subcommittee on Consumer Affairs & Coinage
House Committee on Banking, Finance and Urban Affairs

on

HR 31, The Cash Discount Act

Distribution: Executive Committee, Association Executives

Background

By Executive Order dated January 28, 1981 the President exempted motor gasoline as well as other products from application of the Department of Energy's price and allocation regulations. As a result, the major oil companies are freed from the constraints of the Normal Business Practices Rule (10 C.F.R. 210.62), which generally prohibited suppliers from imposing more stringent credit terms payment and schedules on purchasers than those in effect during the base period (for seasonal credit) or on May 15, 1973 (for other credit terms).

Although within the last year the normal business practices rule's restrictions had been substantially altered at the retail level to maintain consistency with the Federal Reserve Board's policies on credit, the Department of Energy refused to alter the rule as it applied to transactions between refiners and marketers. This refusal appears to have stemmed in part from the recognition that if refiners were permitted to eliminate historical credit terms and credit related discounts, then the cost of credit could be passed through to the marketer in the form of a surcharge. Marketers, however, have been prohibited since 1976 from passing through any surcharge to the credit card holding consumer by a provision of the Truth in Lending Law. Since it would be imminently unfair to force the small business independent marketer to bear the 3% - 3.5% cost of credit which had been historically shouldered by the refiner, the normal business practices rule remained in place. With the advent of decontrol, however, refiners are limited only by their sense of what the market will bear. Yet because of the Truth in Lending Law's prohibition against surcharges, the jobber, and not the market must bear this credit burden. Jobbers are finding themselves between a rock and a hard place as a result of the current law.

The Problem

The problems faced by jobbers as a result of the surcharge prohibition contained in the Act are simple to grasp. Gasoline refiners who honor bank cards or provide their own branded cards to consumers will now begin for the first time to pass through the cost of these services to the jobber. Yet the marketer who honors the bank or branded card for the benefit and convenience of his customer, the consumer, is prohibited by law from assessing that credit card holding customer a similar fee to cover the credit costs charged him by the refiner. The harmful effect on the jobber of this provision of the Truth in Lending Law is already evident in the sale of previously unregulated products such as diesel, batteries and tires -- many jobbers who maintain the credit services of their suppliers have been forced to sell at prices below their cost in order to meet the street price of competitors who accept only cash.

The problem is to some extent unique to the petroleum marketing industry and a function of the keen competition within it. The petroleum marketing industry is competitive in the pure economic sense of the word in that no single firm, or group of firms, is able to exert any control over the price of their product. It is also competitive in the business rivalry sense in that each individual firm competes with others in the community for sales. Jobbers cannot simply raise their prices across

the board to recover the cost of credit as other merchants do -- the gasoline market simply will not bear it. And because the "regular price" is deemed under the regulations to be the credit card price, a posted price which takes into account the cost of credit is uncompetitive in today's market, no matter how legitimate. Even with elimination of a ceiling on cash discount prices, a posted "credit card" price will simply not attract the consumer who needs a tankful of gasoline.

Conclusion

It is essential in this period of decontrol that marketers be given as much flexibility as possible to cope with the uncertainties resulting from the precipitous changes in traditional marketing practices. If the prohibition on surcharges contained in the Truth in Lending Law is allowed to expire on schedule on February 27, 1981, then marketers will be permitted to post a more competitive cash price, while applying the cost of credit where it belongs -- to those customers who choose to take advantage of the conveniences that credit cards afford.

Senator GORTON. Thank you, Mr. Chisholm.
Mr. Larkins.

STATEMENT OF ROBERT P. LARKINS, MARKETING VICE PRESIDENT, EXXON CO., U.S.A., ON BEHALF OF THE AMERICAN PETROLEUM INSTITUTE

[The complete prepared statement and written submission follow:]

STATEMENT OF R. P. LARKINS

MARKETING VICE PRESIDENT

OF EXXON COMPANY, U.S.A.

BEFORE THE

CONSUMER AFFAIRS SUBCOMMITTEE

OF THE

BANKING, HOUSING, AND URBAN AFFAIRS COMMITTEE

UNITED STATES SENATE

ON

FEBRUARY 7, 1984

Mr. Chairman, members of the subcommittee, my name is Bob Larkins, Marketing Vice President of Exxon Company, U.S.A. and I am appearing before the subcommittee in response to your request to the American Petroleum Institute. While the position I present is that of the API and Exxon, any supportive comments will be based on my company's experience. I have also provided the subcommittee with Exxon's written comments on this subject and would ask that the record be held open for two weeks to allow other API member companies to submit their own statements.

The cost of credit associated with oil company credit cards has steadily increased. In Exxon's case, credit costs have gone from about 2¢/credit gallon in 1972 to 4-6¢ today, yet federal and state laws do not uniformly permit us to utilize annual fees, transaction fees, interest from date of purchase or surcharges to recover them.

Some oil companies, including Exxon, have responded to this situation with discount for cash programs. We are pleased with the results of our program, and Exxon retail dealers are increasingly aware of its benefits. Exxon cash customers have clearly benefited in lower prices. Some other suppliers have initiated cash discounts but subsequently abandoned them. Still others have responded to the increased costs of credit by dropping their credit card programs entirely.

Our position is that all methods of recovering credit costs should be made available. Were this the case, suppliers would likely employ varying methods and consumers would be presented with a wider range of choices. The size of fees charged by whatever method would be established by competition in the marketplace.

Recognizing that Congress has extended the surcharge prohibition in the past and may elect to do so again, API and NOJC have agreed on a suggested amendment to the Truth-in-Lending law which, in this case, would still allow some additional methods of credit cost recovery. Specifically, this amendment would permit participation fees, such as annual and transaction fees, and pre-empt the regulation of such fees by state law, with an extension of the existing prohibition of surcharges at the point of sale until February 27, 1987. Such an amendment would broaden the opportunities for credit cost recovery while retaining those options currently available.

Allowing the surcharge prohibition to expire, accompanied by a broad federal preemption of conflicting state laws relating to credit cost recovery, would be the most desirable outcome and allow a full range of options to be offered to the consumer. However, I want to stress with the subcommittee the disastrous effects

which would result should Congress just let the federal prohibition expire without this pre-emption. This is not the simple approach to deregulation that it might appear to be. Should it occur, credit card issuers would be placed in an untenable position.

Since surcharges are typically defined as finance charges, even a modest surcharge would likely violate the usury laws of most states. In addition, since the lawful rate depends on the length of time between purchase and billing dates, which is unknown to the merchant, service station dealers would be unable to determine whether a given charge was legal.

In the interest of time, I will skip over additional state problems in my written submission but must note that the problems are not limited to the retail level. Card issuers cannot allow themselves to be put in the position of collecting a potentially usurious surcharge added by a retailer. However, today's modern computer based credit card processing systems cannot electronically distinguish the cost components on the charge ticket. Thus it is impossible, with current systems, to determine if a surcharge has been applied.

This is a situation where one federal standard must be applied to allow orderly credit card operations to continue. However, if Congress is unable to take substantive action before the surcharge prohibition expires, a temporary extension is essential to avoid the problems mentioned.

In response to the subcommittee's request, I will briefly comment on the assertion drawn by some from the Federal Reserve Board's study of credit cards in the U.S. economy that the size of the subsidy cash customers provide to credit users under a one price system is insignificant. Exxon's data indicates that prior to our cash discount program, 1¢ to 2¢ per gallon of the cash customer's gasoline purchase helped pay for a credit card system they didn't utilize. Such a difference is significant enough to alter the buying decisions of many customers.

In summary, we believe it is extremely important to have additional means available to pass the cost of credit along to those who wish to have this convenience. This will also work to the benefit of the large majority of customers who pay cash and do not wish to contribute to credit cost recovery.

Thank you for your consideration, and I'll be happy to answer your questions.

Exxon Company, U.S.A.
Written Submission
to the
Consumer Affairs Subcommittee
of the
Banking, Housing, and Urban Affairs Committee
United States Senate

February 7, 1984

Introduction

Since World War II, credit cards have become a widespread part of the U.S. economic system. Credit cards have gradually matured from their beginning as an innovative marketing tool to gain sales to an integral requirement for retaining base retail business in today's highly competitive environment. Over 600 million cards are in circulation and about 70% of American households have one or more credit cards. The credit card industry has, however, been subject to a number of changes in recent years brought on principally by steadily increasing costs. Most card issuers have been seeking ways to reduce their costs or to recover a larger share of them from cardholders and merchants.

This paper covers the background and scope of Exxon's and the petroleum industry's credit card activities and why new methods to recover credit costs have been sought. It also describes alternative methods of credit cost recovery considered, highlights the results of Exxon's Discount for Cash Program, and outlines the company's position on legislation in this area.

Background

Credit cards have been a part of gasoline marketing for over 50 years. At the end of 1982, 23 oil companies had issued over 100 million credit cards accounting for over $25 billion in annual sales. Today, around 35% of American households have one or more oil company credit cards. Exxon has around 7.3 million credit cards in circulation that account for about $3 billion in annual sales made on over 150 million individual credit card tickets.

Approximately 30% of the population utilizes oil company credit cards and this percentage has remained essentially unchanged for the past decade. The use of all other types of credit cards, however, has generally increased over the period. Bank cards, for example, were used by only 19% of all families in 1971 but this has risen to 47% of all families in 1982.

Although no definitive data is available, it is reasonable to assume that all types of credit cards have generally been subject to the same cost pressures. Non-oil company cards have been relatively free to adapt to changing market conditions, while oil company cards were subject to federal price controls for most of the

1970's and early 1980's. During this period, many non-oil company card issuers introduced a variety of methods for recovering more of their costs from the cardholder in addition to the merchant's fee and finance charge revenue they were already receiving.

While there are many similarities between oil company credit cards and other types of cards--such as bank cards, travel and entertainment cards (T&E), and proprietary store cards--there are also a number of differences. Oil company cards are most typically used to purchase a narrow spectrum of automotive related products and fuels. Banks, T&E, and most proprietary cards are used for an almost unlimited range of goods and services, including outright cash loans. These cards are primarily revolving charge cards or open-ended accounts that permit payment over many months. Oil company cards, on the other hand, usually limit the revolving feature to non-gasoline purchases.

Bank and T&E cards are also accepted at a wide range of businesses, including most branded service stations, while oil company cards are generally honored only at stations displaying the brand of the card-issuing company. Proprietary store cards (such as Penney's and Sears) are accepted only at outlets directly operated by the card issuer. Oil company credit cards are accepted both at the relatively small percentage of service stations that are company operated but also by tens of thousands of independent dealers supplied by the card issuers. Bank and T&E card issuers have charged the businesses who accept their cards a merchant's fee for many years. Prior to decontrol in January of 1981, no oil company charged such fees, and today only five major oil companies utilize them.

Historically, oil companies had to recover their credit card costs in the wholesale price of gasoline, and service station dealers have passed this cost along to their customers. Under this system, service station dealers charged the same price and made the same gross profit on credit sales and cash sales. However, the credit and cash customers also shared in carrying the cost of the retail credit system.

The cost of offering a retail credit card has three components--the capital cost of receivables, the administrative expense of processing tickets, and bad debts. Partially offsetting these costs, but only to a small degree, are finance charges on revolving balances. In Exxon's case only about 20% of credit card customers pay any finance charges at all, and these charges offset only about 15% of the credit costs.

Exxon's credit card cost, net of this finance charge revenue, was approximately 2.0 cents per credit gallon in 1972. Because of rising gasoline prices and dramatically higher interest rates, the net cost rose to 4-6 cents per credit gallon by 1981. With decontrol of gasoline prices that year, the marketplace became highly competitive, and major brand marketers found it increasingly difficult to compete for cash customers. This is significant since two-thirds of all gasoline customers pay with cash. A brief look at market shares illustrates the major brand marketers' dilemma. Between 1962 and 1982, major brand companies saw their gasoline market share decline from over 80% to less than 65%. A contributing factor in this loss in market share to independent marketers was difficulty of major brand marketers in being price competitive for the cash customer's business.

In order to remove the subsidy the cash customer was paying for the credit user as well as be in a position to compete more effectively for the cash buyer, many major brand marketers sought a way to separate the cost of credit from the price of gasoline.

Credit Cost Recovery Alternatives

A number of alternatives would provide both these benefits. One of these is an annual fee billed to each credit card customer once a year for the privilege of keeping the credit card. This method would both separate the cost of credit from the price of gasoline and place it on the credit user. This may be the simplest method and most understandable to consumers. There are, however, a number of drawbacks to annual fees.

From the credit card issuer's viewpoint, research indicates an annual fee would probably result in a considerable number of consumers giving up their credit cards. Occasional credit card users would have to pay the same price as frequent users, and thus would incur a higher cost on a per transaction basis. Consumers, faced with a one-time choice between keeping the card and giving it up, might decide in the negative. Finally, several states have laws which specifically prohibit charging cardholders such a fee.

Another method would be a transaction fee. This involves the credit card issuer charging each customer a fee on his monthly credit card statement, either on a percentage of monthly charges or on a cents-per-transaction basis. This method has an advantage in that any credit charges are related directly to the purchase; and the cash vs. credit decision is made by the customer each time a transaction occurs. A transaction fee would be very simple to administer in both current and anticipated future credit card processing and billing systems. It would, we believe, cause few, if any, problems in the relationship between card issuers and their dealer and distributor customers.

Unfortunately, it is not possible to implement transaction fees under current federal and state laws. Many state laws would consider a transaction charge to be interest and any fee large enough to offset costs would violate state usury laws. Further, federal law prohibits oil companies from billing credit cardholders transaction fees for purchases made at company operated stations. In such instances, a transaction fee would become a surcharge for credit, specifically prohibited in Truth-in-Lending. In addition, a number of states have grace period laws which prohibit a card issuer from charging any interest on charges paid within a certain time period, e.g., one billing cycle.

Similar to transaction fees, credit costs could also be recovered by charging cardholders interest from the date of purchase. This method would assess customers a finance charge on each ticket for the number of days between the actual purchase date and the billing date. However, the same legal considerations mentioned for transaction fees prevent this method from being utilized as well.

Still another possible method would be a surcharge for credit. This involves the card issuer charging its dealers a merchant's fee or processing charge on each ticket. Dealers would add this surcharge on to the retail price of their gasoline when the sale was charged on a credit card. However, current federal law prohibits charging customers an additional fee for credit in this manner.

Unless Congress acts, the surcharge prohibition in Truth-in-Lending will expire February 27, 1984. Its expiration, without federal preemption of the application of state usury laws to such fees, would create an additional set of problems which are discussed later in this paper.

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A currently available method of recovering credit costs is offering consumers a discount for paying cash, rather than charging them for using credit. Under a discount for cash program, dealers and distributors are charged a processing or merchant's fee by the card issuer similar to those historically used by bank and T&E cards. However, unlike these cards, some oil company card issuers also lower wholesale gasoline prices to dealers and distributors in order to offset the merchant's fee. Retailers are then encouraged to offer a two-tier pricing system with a regular credit price and a lower cash price.

While cash discounts may seem similar to credit surcharges, they do differ under the law. With cash discounts, the credit price is the "regular price" from which a discount for cash is subtracted. Such discounts are specifically authorized in federal law. With a credit surcharge, the cash price becomes the regular price to which an additional charge is added for payment by credit card. These surcharges are specifically prohibited in current federal statutes.

A discount for cash program has several advantages in today's marketplace. With it, retail customers can enjoy a lower price for gasoline if they choose to pay cash. In addition, they have a continuous choice between the convenience of using credit or the saving from paying cash. The cash customer does not subsidize a service he does not use when paying cash. By offering a lower cash price, service station operators have the potential to compete more effectively in the marketplace, but can continue to offer credit customers the convenience they seek for a price that is commensurate with the credit service they receive.

Cash discounts do have some drawbacks in that they are not commonplace in our economy and thus may be foreign to many consumers. They also require a certain amount of calculation on the part of the merchant to determine his pricing structure and figure the customer's discount.

Exxon's Discount for Cash Program

Exxon studied the cash discount approach for many years. In the mid 1970's, tests were conducted in Charleston, South Carolina, and Abilene, Texas. While the test results were favorable, federal price controls effectively prevented going beyond the test stage.

After controls were lifted, Discount for Cash was tested again in early 1982 in Phoenix, Arizona; Jackson, Mississippi; Worcester, Massachusetts; and Norfolk, Virginia. Based upon these test results, the program was implemented nationwide in September of 1982.

Exxon's Discount for Cash program works in the following manner. From the inception of the program, Exxon charged a 3% merchant's fee on credit card tickets received from dealers and distributors to partially recover the cost of credit. Simultaneously, the company reduced its wholesale motor fuel prices to dealers and distributors in order to offset, on average, the merchant's fee. Exxon retailers could then adjust their prices for cash and credit transactions in order to compete more effectively for the cash segment of the gasoline market and to place the cost of credit on the credit user. Most participating retailers established their cash/credit price differential at around 4¢/gallon. Exxon's wholesale price reductions and merchant's fee implementation were accompanied by media advertising and a mer-

chandising program designed to encourage Exxon branded retailers to offer cash discounts.

In general, our program has been well received by both our customers and the motoring public. About 75% of Exxon dealers we serve directly are participating. Marketing research indicates that a majority of consumers believe Discount For Cash is fair to the cash customer and not unfair to the credit customer. Further, a majority of credit cardholders believe that buying gasoline at stations offering one price for cash or credit will be more expensive than buying with cash at stations offering a cash discount. The lower cash price resulting from the program is also beneficial to the disadvantaged and those on fixed incomes who may not have credit cards.

Other Oil Company Activities

Many other oil companies have chosen a different response to the credit cost recovery problem. Since decontrol, four companies, Arco, Getty, Clark, and Pennzoil, have discontinued their credit card entirely. Four other companies, Amoco, Chevron, Texaco, and Mobil, have utilized merchant's fees. Two companies, Gulf and Phillips, tried this approach and discarded it. The balance of the credit card issuing oil companies continue to include their credit costs in wholesale gasoline prices.

While we have no comparative data on other companies' programs, a recent Lundberg Survey reported on the implementation of these various strategies at retail outlets. According to that report, outlets utilizing Discount For Cash made up almost 40% of the stations surveyed in January 1984 and this represented around a 3% increase versus January 1983. The number of stations posting a single price for cash and credit declined from about 54% in January 1983 to only slightly over 50% in 1984.

Federal Reserve Study

The recent Federal Reserve Board study of credit cards in the U.S. economy draws a number of conclusions which tend to support the cash discount concept; e.g.,

- o Credit sales cost merchants more than cash sales.
- o Credit card sales do not generate incremental sales sufficient to offset credit card costs to any measurable degree.
- o In a one-tier pricing system, cash buyers subsidize the credit card users to some extent.
- o A two-tier pricing system is feasible for most retailers with a cash price below and credit price above the original one-tier price.

While these conclusions were formulated for all industries, not just gasoline retailing and gasoline retailing data made up only a portion of the study, a few comments are appropriate.

Chapter 4 of the study concludes that the net cost of credit card transactions to retailers is typically 2%-3% higher than for other types of transactions. It also concludes that this roughly corresponds to the "net credit department deficits of

retailers that issue their own credit cards." However, Exxon's credit card transaction cost experience in recent years ('79-'82) is higher than this at 3%-4%. This is probably due to the higher credit to cash ratios in the petroleum industry. In the early '70s, over one-third of Exxon's gasoline was sold on credit cards. This remained relatively constant until Discount For Cash was implemented. However, Exxon's credit card ratio is still almost double the 15% of general merchandise sales on third party cards cited in the study.

The Federal Reserve Board's study infers that the size of the subsidy cash customers provide to credit users under a one price system is insignificant. Exxon's data indicates that prior to our cash discount program, 1¢ to 2¢ per gallon of the cash customer's gasoline purchase helped pay for a credit card system they didn't utilize. Such a difference is significant enough to alter the buying decision of many customers.

The report makes the statement that "gasoline companies have sought various means to dissuade customers from using credit cards." This is certainly neither the purpose or the result of Exxon's program. Discount for cash was not designed to discourage credit purchases. It was specifically designed to stop the outflow of cash customers by removing the cost of credit from the cash price of gasoline.

This study also draws the general conclusion that the use of credit cards in the economy as a whole does not create any incremental sales. While this may be true, we believe that the use of credit cards in the petroleum industry can be an effective marketing tool and, if properly utilized, is capable of shifting sales from one marketer to another.

In Chapter 6, the Federal Reserve study makes a case for limiting the marketplace to only one method of two-tier pricing--either cash discount or credit surcharge--in order to reduce customer confusion. In our opinion, however, any potential confusion can be eliminated by proper price posting. So long as both cash and credit prices are communicated in advance, it makes no difference how they were derived. We believe that the choice of which system, surcharge or cash discount, will prevail is one best made by consumer preference.

Surcharge Prohibition

In general, the Federal Reserve study provides Congress with a good deal of data that may be useful in evaluating the question of whether or not to extend the credit surcharge prohibition soon to expire. It is important to emphasize the adverse impact of simply letting the prohibition expire without enacting a broad federal preemption of the state laws also affecting surcharges.

Since surcharges are finance charges, even a modest surcharge would likely violate the usury laws of most states. Since the lawful rate depends on the length of time between purchase and billing dates, which is unknown to the merchant at the time of sale, service station dealers would be unable to determine if a given charge was legal. These problems would exist in all of the states except those few in which finance charges have been deregulated.

Problems remain, even in deregulated states, because the usury rates apply to the state of residence of the cardholder. If, for example, in a deregulated state, a customer from a regulated state purchased gasoline and paid a surcharge, there would still be a violation of the usury laws of the state of the customer's residence. To avoid this problem in a deregulated state, the merchant would have to be familiar with the laws of surrounding states and determine the state of residence of each customer prior to imposing a surcharge on a credit card sale. This could result in favored treatment for the out-of-state purchaser and would be an unpopular, if not unworkable, practice. Also, if a finance charge arises in connection with revolving credit or late payment, the combination of surcharge of 3% plus a finance charge of, for example 1.5%, would result in a total rate of at least 4.5% per month, which would likely draw the maximum penalty for usury in most states. Moreover, any surcharge imposed at the time of sale would automatically violate grace period laws.

Allowing surcharges by merchants subject to current state law also creates considerable problems for the automated credit card processing system used by virtually all card issuers. Today's modern-computer based systems cannot electronically distinguish the cost components on the charge ticket. Thus it is impossible, with current equipment, to determine if a surcharge has been applied.

Irrespective of the lack of actual knowledge of surcharging by a retailer, the card issuer is at great risk. It is possible that the courts might still attribute knowledge of an illegal surcharge to the credit card issuer and, through a class action, require the card issuer to go through extensive discovery and expensive payment procedures. It might be very difficult or impossible to recover these expenses from the offending merchants who levied the surcharge.

Exxon Position

While Exxon is generally pleased with the results of its Discount for Cash program and currently has no plans to change it, our investigations into other methods of credit cost recovery lead us to believe that consumers would be better served if all methods of recovering credit cost were available. Were this the case, consumers would likely be presented with a wider range of choices and would be free to select which method or methods they prefer. The size of the associated fees would be regulated by competition.

However, as a practical first step, Exxon supports expanding the available methods of credit cost recovery through amendments to the Truth-in-Lending law. Conceptually, these amendments would permit participation fees (annual fees or transaction charges) and provide a broad preemption of state usury/credit laws regarding these fees. Exxon supports any initiative such as this which broadens the opportunities for credit cost recovery, so long as it does not foreclose options currently available.

Exxon would also support allowing the surcharge prohibition to expire, so long as expiration was accompanied by federal legislation to provide a broad federal preemption of state usury and grace period laws as they relate to credit surcharges.

02/06/84

EXXON COMPANY, U.S.A.

February 13, 1984

The Honorable Slade Gorton
Chairman, Consumer Affairs Subcommittee
Senate Banking, Housing, and
Urban Affairs Committee
Room 513, Hart Building
Second and C Streets, NE
Washington, DC 20510

Dear Senator Gorton:

The recent subcommittee hearing on the expiration of the credit card surcharge prohibition in the Truth-in-Lending law provided an opportunity for a broad discussion of the issue. I welcomed the opportunity to testify. In the interest of accuracy, however, I would like to comment on the Lundberg Letter price survey data presented during the hearing and its interpretation by Mr. Vic Rasheed, Executive Director of the Service Station Dealers of America.

The survey in question, published in the February 18, 1983 Lundberg Letter, compared the average retail prices charged at outlets supplied by discount for cash major brand marketers to the average retail prices at outlets supplied by Shell. Lundberg's methodology in this survey distorts the difference in retail prices since it reports a difference between nationwide averages rather than an average of the differences in individual markets. Lundberg's method, in effect, compared Shell's prices surveyed in one area of the nation to Exxon's prices surveyed in another.

Exxon pointed out the error in this methodology to Mr. Lundberg in an April 1983 letter which specifically addressed the survey in question. In an editorial in his April 27, 1983 edition, Mr. Lundberg acknowledged that Exxon's comments were correct.

In Mr. Rasheed's testimony he quoted the February 1983 Lundberg data which he claimed showed the average price of the four major brand marketers that offer cash discounts was 1.67¢ per gallon above Shell's price. His stated purpose was to illustrate to the subcommittee that wholesale gasoline prices of majors offering discount for cash were not lower than those of majors who do not offer such a program, and that such programs were harmful to participating dealers. Our data does not support this conclusion.

The Honorable Slade Gorton

February 13, 1984

A review of recent Gulf/East Coast wholesale prices in the last quarter of 1983, shows that Exxon's wholesale gasoline prices have ranged from 1.9¢/gallon to 2.4¢/gallon below Shell's. Based on our analysis of actual retail prices, typical cash/credit differentials, full serve/self serve differentials, and grade ratios, we believe that Exxon dealers, even after paying a 3% processing fee, were able to obtain essentially the same retail margins as Shell dealers.

Since Exxon's wholesale prices were lower, and dealer margins similar, we see no merit to Mr. Rasheed's argument that Exxon's discount for cash program was somehow harmful to our dealers. On the contrary, our data indicates that cash customers were able to obtain a lower price, while participating Exxon dealers maintained competitive margins. Further, our studies indicate that dealers who participate in discount for cash have a volume performance superior to those who do not participate.

We continue to support legislation which broadens the options to recover credit costs without restricting any avenues currently available. However, I want to emphasize that it is critical that expiration of the surcharge ban not be allowed to occur without enactment of a broad pre-emption of state usury and grace period laws.

Sincerely,

RPL:slw

c: Mr. Dan Lundberg
Mr. Vic Rasheed
Mr. D. E. Smiley

Senator GORTON. Thank you, Mr. Larkins.
Mr. Rasheed.

STATEMENT OF VIC RASHEED, EXECUTIVE DIRECTOR, SERVICE STATION DEALERS OF AMERICA

Mr. RASHEED. Thank you, Mr. Chairman.
[The complete statement follows:]

SSDA
SERVICE STATION DEALERS OF AMERICA

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VIC RASHEED
Executive Director

TESTIMONY OF

VIC RASHEED
EXECUTIVE DIRECTOR
SERVICE STATION DEALERS OF AMERICA

BEFORE THE

CONSUMER AFFAIRS SUBCOMMITTEE
OF THE
SENATE BANKING COMMITTEE

REGARDING

EXTENSION OF THE
CASH DISCOUNT ACT

FEBRUARY 7, 1984

OFFICERS

DON SKILLING
President
Mill Valley, CA

TRACY STANTON
First Vice President
Bexley, OH

DAVE WOODWARD
Second Vice President
Ft. Lauderdale, FL

EMMETT PROBUS
Third Vice President
Louisville, KY

TOM MARKOS
Treasurer
Mountainside, NJ

JOSEPH J. GRIGH
Past President
Mt. Clemens, MI

JERRY COHEN, Esq.
General Counsel
Washington, DC

MR. CHAIRMAN:

MY NAME IS VIC RASHEED. I AM EXECUTIVE DIRECTOR OF THE SERVICE STATION DEALERS OF AMERICA REPRESENTING 60,000 RETAIL SERVICE STATION DEALERS IN THE U.S. WE ARE THE LARGEST SINGLE GROUP OF PETROLEUM RETAILERS AFFECTED BY THE CASH DISCOUNT ACT.

WE SUPPORT AN EXTENSION OF THE ACT, BUT ONLY FOR A PERIOD OF THREE MONTHS TO ALLOW NECESSARY AMENDMENTS TO THE ACT TO BE MADE.

WE HAVE ENCOUNTERED MANY PROBLEMS WITH THE CASH DISCOUNT ACT AS IT IS BEING IMPLEMENTED IN ITS PRESENT FORM. IT HAS CAUSED MASS CONFUSION AT THE GASOLINE PUMPS FOR THE MOTORING PUBLIC, AND ALLOWED SOME OIL COMPANIES TO DUPE MOTORISTS INTO BELIEVING THAT THEY ARE GETTING GENUINE DISCOUNTS FOR CASH, WHEN IN FACT THEY ARE NOT. IT SIMPLY ALLOWS THE COMPANIES TO CHARGE A PREMIUM FOR THE USE OF THEIR CREDIT CARDS. IT HAS CAUSED SOME DEALERS AND THEIR CUSTOMERS TO BE VICTIMIZED BY EMPLOYEES IN CASES WHERE DISCOUNTS ARE PAID IN CASH.

PUBLIC CONFUSION OVER PRICING AT THE PUMPS BEGAN IN EARLY 1982 WHEN SEVERAL COMPANIES DECIDED THAT, WITH OVER 100 MILLION OIL COMPANY CREDIT CARDS NOW IN THE HANDS OF MOTORISTS, THE TIME HAD COME FOR THE COMPANIES TO BEGIN CHARGING THEIR CUSTOMERS FOR THE USE OF THEIR CARDS. UP TO THIS POINT, THE STRATEGY HAD BEEN TO PUSH OIL COMPANY CREDIT CARDS INTO THE HANDS OF MOTORISTS TO PROMOTE THE SALE OF THE COMPANIES' PRODUCTS. THE CREDIT CARD WAS THE LARGEST SINGLE SALES PROMOTION DEVICE USED BY OIL COMPANIES. IN 1981 THEY SOLD $27 BILLION WORTH OF PRODUCT ON THEIR CARDS.

OIL COMPANIES HAVE HISTORICALLY INCLUDED AN ADDITIONAL COST OF SEVERAL CENTS PER GALLON IN THE WHOLESALE PRICE OF GASOLINE SOLD TO THEIR BRANDED DEALERS. THIS COVERED USE OF THE COMPANY CREDIT-CARD (2 - 2 1/2¢), USE OF THE TRADEMARK, ADVERTISING, PROMOTION, DELIVERY ETC. WHEN THEY BEGAN CHARGING THEIR DEALERS AN ADDITIONAL 3-4% PROCESSING FEE FOR THE CARD, DEALERS WERE TOLD THAT THEY WOULD RECEIVE A <u>LOWER</u> WHOLESALE PRICE TO COMPENSATE FOR

THE NEW CHARGE. THIS IS NOT THE CASE TODAY, AND DEALERS MUST PAY BOTH THE HIGHER PRICE FOR BRANDED GASOLINE AND A SURCHARGE FOR THE USE OF THE COMPANY CREDIT CARD.

A SURVEY OF OIL COMPANY WHOLESALE PRICES BY THE LUNDBERG LETTER, AN INDUSTRY PUBLICATION, SHOWED THAT IN FEBRUARY, 1983, SHELL WHICH DOES NOT HAVE DISCOUNT-FOR-CASH PROGRAM AND CONTINUES TO ALLOW USE OF ITS CREDIT CARD AT NO CHARGE, WAS RETAILING GAS AT AN AVERAGE OF 1.67 CENTS BELOW THE AVERAGE "CASH DISCOUNT" OF EXXON, AMOCO, CHEVRON AND MOBIL.

TODAY, SHELL CUSTOMERS BUY GASOLINE AT SELF-SERVICE ISLANDS OR FULL-SERVICE ISLANDS AND PAY THE SAME PRICE WHETHER THEY PAY CASH OR USE THEIR CREDIT CARDS. GULF, SUNOCO, UNION AND OTHERS HAVE SIMILAR POLICIES.

ADDING TO CUSTOMER CONFUSION, IS THE GOOD POSSIBILITY THAT THEY WOULD HAVE TO PAY MORE AT A NEARBY COMPETING STATION WHERE THEY SEE A LARGE SIGN PROCLAIMING THAT THEY CAN SAVE FOUR OR FIVE CENTS PER GALLON IF THEY PAY WITH CASH. A COMPETING ARCO OR UNBRANDED OUTLET MAY BE SEVERAL CENTS BELOW THE "CASH DISCOUNT PRICE".

MOTORISTS ARE LEFT WITH THE INEVITABLE CONCLUSION THAT THEY REALLY ARE NOT GETTING A SO-CALLED "CASH DISCOUNT," BUT ARE PAYING A HIGHER PRICE TO USE THEIR CREDIT CARD IN THESE OUTLETS; AND THE DISCOUNT PRICE IS REALLY THE NORMAL PRICE THEY ONCE PAID, BEFORE THERE WAS A CREDIT CARD FEE. DEALERS, FACED WITH CREDIT CARD PROCESSING FEES AVERAGING WELL OVER THREE CENTS PER GALLON, HAVE LITTLE CHOICE BUT TO PUSH "DISCOUNTS FOR CASH" TO REMAIN COMPETITIVE SINCE, IN MANY CASES, THEY ARE NOT MAKING THREE CENTS PER GALLON MARGIN TO EVEN PAY THE FEE.

THEY HAVE ALSO BEEN FORCED TO IMPLEMENT OTHER PLOYS SUCH AS ACCEPTING CREDIT CARDS ONLY FOR SPECIFIC PRODUCTS SUCH AS PREMIUM GAS OR ONLY AT FULL-SERVICE ISLANDS, WHERE THE HIGHER MARK-UP ALLOWS THEM TO PAY THE ADDITIONAL CREDIT-CARD FEE.

DEALERS WHO OFFER THE DISCOUNT AS A CASH PAYMENT TO THE CUSTOMER HAVE HAD PROBLEMS MAINTAINING ACCURATE BOOKKEEPING

RECORDS. IN SOME CASES, EMPLOYEES HAVE KEPT THE CASH DISCOUNTS INSTEAD OF PASSING THEM ON TO CUSTOMERS. BECAUSE THESE ARE SMALL CASH TRANSACTIONS, BOOKKEEPING IS A NIGHTMARE.

DIFFERENCES BETWEEN OIL COMPANY CREDIT-CARDS AND BANK CARDS

THERE ARE SEVERAL DIFFERENCES BETWEEN OIL COMPANY CARDS AND BANK CARDS WHICH WE SHOULD CONSIDER AT THIS POINT.

1. OIL COMPANIES TRADITIONALLY HAVE CHARGED A WHOLESALE MARK-UP ON BRANDED GAS TO THEIR RETAILERS TO COVER A VARIETY OF SERVICES, THE LARGEST SINGLE COMPONENT BEING THE COST OF THE CREDIT-CARD. BY ELECTING TO IMPOSE AN ADDITIONAL CREDIT-CARD PROCESSING FEE ON THEIR RETAILERS, OIL COMPANIES ARE IN EFFECT CHARGING THEIR RETAILERS TWICE, FORCING DEALERS IN MANY CASES TO RESTRICT CREDIT-CARD SALES, OR RAISE THE PRICE OF GASOLINE.

2. OIL COMPANIES USE THEIR CREDIT CARDS PRIMARILY TO PROMOTE THE SALE OF THE COMPANY-BRANDED GASOLINE AND OTHER ITEMS ON WHICH THEY MAKE CONSIDERABLE PROFITS. BANK CARDS OFFER ONLY A SIMPLE CREDIT SERVICE TO MERCHANTS AND CARD-USERS; THEY RECEIVE NO INCOME FROM SALES OF PRODUCT AND DEPEND SOLELY ON A FEE THEY RECEIVE FOR THIS OPTIONAL CONVENIENCE.

3. MERCHANTS CAN SHOP AROUND FOR THE BEST BANK CARD SERVICE AND CAN DROP IT IF THE RATE BECOMES EXHORBITANT. DEALERS, ON THE OTHER HAND, ARE CAPTIVE CUSTOMERS OF THEIR SUPPLIERS AND CAN RARELY AFFORD TO GIVE UP THE COMPANY CARD WHICH HIS CUSTOMERS MAY USE FOR UP TO 70% OF HIS SALES.

OIL COMPANIES HAVE TAKEN ADVANTAGE OF THEIR CAPTIVE-CUSTOMER RETAILERS TO ARBITRALILY IMPOSE THE ADDITIONAL CREDIT FEE UPON THEM, FORCING THEM TO EITHER RECOVER IT FROM THEIR CUSTOMERS IN VARIOUS WAYS OR TRYING TO ABSORB IT. THE LATTER OPTION HAS COST SOME DEALERS UP TO $3,000 PER MONTH. BY FORCING THEIR RETAILERS TO COLLECT THE NEW CREDIT CARD FEE THROUGH INCREASED RETAIL PRICES, OIL COMPANIES HAVE BEEN ABLE TO INSULATE THEMSELVES FROM PUBLIC OPINION AND PUT THE BLAME ON THEIR DEALERS.

NEED FOR OIL COMPANIES TO COMPETE

THE OIL COMPANIES ARE CURRENTLY IN A POSITION WHERE THEY ARE ABLE TO SET ALL OF THE RULES FOR CARD USERS AND DEALERS IN THEIR CREDIT OR CASH TRANSACTIONS WITH THE OIL COMPANIES.

IN SOME CASES, DEALERS ARE ADOPTING SOME FORM OF CASH SALES BECAUSE OF THEIR NEED FOR READY CASH TO PURCHASE GASOLINE. OFTEN THEY DO NOT RECEIVE CASH FROM THEIR OIL COMPANY FOR THEIR CREDIT CARD INVOICES, FOR A PERIOD OF UP TO 10 DAYS. DEALERS MAY HAVE UP TO $50,000 IN CREDIT-CARD "FLOAT". HOWEVER, THEY STILL MUST PAY C.O.D. IN CASH FOR THEIR GASOLINE. A TYPICAL TANKER-LOAD COSTS ABOUT $10,000.

OUR DESIRE IS TO GET THE DEALERS OUT OF THE MIDDLE OF THIS CONFUSION OVER WHICH THEY HAVE NO CONTROL. WE BELIEVE THAT OIL COMPANIES WHO FEEL THAT THEY MUST NOW FURTHER RECOVER THE COST OF EXTENDING CREDIT, SHOULD BE ALLOWED TO DO SO. BUT THEY SHOULD RECOVER DIRECTLY FROM THEIR CREDIT-CARD USERS.

DEALERS WHO ALREADY PAY THEIR SHARE FOR CREDIT-CARD USAGE, IN THE PREMIUM INCLUDED IN THEIR GASOLINE PRICES, WOULD THEN BE FREE TO PRICE AT A SINGLE COMPETITIVE PRICE FOR EACH GRADE OF GASOLINE, WHETHER IT BE A CASH OR CREDIT SALE.

IF A COMPANY WANTED TO ADD A 3% PROCESSING FEE TO THE CREDIT-CARD CUSTOMER'S INVOICE, IT COULD DO SO AT THAT TIME. ALL THE TIME REMEMBERING THAT AT LEAST FOUR MAJOR OIL COMPANIES HAVE CHOSEN NOT TO CHARGE ANY ADDITIONAL FEE FOR THE USE OF THEIR CARD. SHELL HAS PICKED UP OVER TWO MILLION NEW CREDIT-CARD CUSTOMERS FROM ITS COMPETITORS AS A RESULT.

THIS IS ONE OF THE RARE OCCASIONS WHERE OIL COMPANIES HAVE COMPETED HEAD TO HEAD FOR CUSTOMERS. WE BELIEVE THAT THIS COMPETITION CAN BE HEIGHTENED BY ALLOWING THEM THE OPTION OF CHARGING OR NOT CHARGING THEIR CREDIT CARD CUSTOMERS; AND REMOVE THE SUBTERFUGE OF CONCEALING THEIR HIGHER CREDIT COSTS BY THE ILLUSION OF A "DISCOUNT-FOR-CASH" AND IMPOSING HIDDEN COSTS ON SERVICE STATION DEALERS.

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SAFEGUARDING AGAINST OIL COMAPNY DOUBLE-DIPPING

MR. CHAIRMAN, WE UNDERSTAND THAT THIS COMMITTEE IS FAMILAR WITH PROPOSED LEGISLATION THAT HAS BEEN DRAFTED BY THE OIL COMPANIES WHICH WOULD ALLOW THEM TO IMPOSE ANNUAL FEES OR TRANSACTION CHARGES ON THEIR CREDIT CARD CUSTOMERS. WHILE WE ENDORSE THIS CONCEPT IN PRINCIPLE, WE DO HAVE A SPECIFIC CONCERN.

BOTH DEALERS AND CUSTOMERS WOULD WELCOME AN END TO THE CONFUSION CREATED BY "DISCOUNT-FOR-CASH" AND WOULD WELCOME FAIR COMPETITION IN THE MARKET-PLACE WITH A SINGLE PRICE FOR EACH PRODUCT.

OUR CONCERN IS THAT THIS LEGISLATION, AS NOW DRAFTED, DOES NOTHING TO ELIMINATE THE PRACTICE OF IMPOSING SURCHARGES ON THE SERVICE STATION DEALER. IF THIS LEGISLATION IS ADOPTED IN ITS CURRENT FORM, THE OIL COMPANIES WOULD THEN BE FREE TO CHARGE BOTH THE DEALERS AND THE CONSUMER FOR THE USE OF THEIR CARD.

WE HAVE SERIOUS MISGIVINGS ABOUT THIS AND WROTE TO EACH OF THE FOUR MAJOR OIL COMPANIES WHO HAVE, "DISCOUNT-FOR-CASH PROGRAMS". WE ASKED THEM FOR SOME ASSURANCE THAT THEY WOULD REFRAIN FROM DOUBLE-DIPPING FOR CONSUMER-CREDIT, IF THE PROPOSED LEGISLATION WAS ENACTED.

I AM ATTACHING TO THIS TESTIMONY, COPIES OF THE LETTERS WE RECEIVED IN REPLY. AS YOU CAN SEE, NO OIL COMPANY WAS WILLING TO FORECLOSE THE OPTION OF BILLING BOTH THE DEALERS AND CONSUMERS FOR THE USE OF THEIR CREDIT-CARDS.

THEREFORE, WHEN THIS COMMITTEE DOES TAKE UP THE PROPOSED LEGISLATION TO PERMIT DIRECT BILLING OF GASOLINE CREDIT-CARDS COSTS TO THE CARD-USER, WE URGE THAT YOU INCLUDE A PROHIBITION ON DUAL BILLING OF CONSUMERS AND DEALERS FOR CREDIT COSTS.

TEXACO

ATTACHMENT I

November 3, 1983

Mr. Vic Rasheed
Executive Director
Service Station Dealers of America
2021 K Street - Suite 303
Washington, D.C. 20006

Dear Mr. Rasheed:

This will acknowledge your letter of October 21, 1983 regarding proposed amendments to the Federal Truth-In-Lending Act.

Our support of these proposed changes is based on the premise that they will provide a choice for all card issuers to recover their costs in different ways and that it would remove some of the constraints under which our industry now operates.

Of course, if Texaco could assess fees directly on cardholders, the pressure to recover credit-related costs from retailers would be greatly relieved, and we would explore the new options which would be available to us. However, we cannot predict at this time what competitive market conditions will exist in the future; therefore, we cannot assure you that we would abandon our practice of recovering part of the costs of our credit card program from the retailers.

We trust this will assist you in formulating your position on the legislation.

Yours very truly,

Ellis W. Gunnels

ELLIS W. GUNNELS

EWG:JSJ

RECEIVED 1983

ATTACHMENT II

Mobil Oil Corporation

1225 GALLOWS ROAD
FAIRFAX, VIRGINIA 22037

J.B. HINTON
VICE PRESIDENT AND
GENERAL MANAGER — MARKETING

November 9, 1983

Mr. Vic Rasheed
Service Station Dealers of America
2021 K Street, N.W.
Suite 303
Washington, D.C. 20006

Dear Mr. Rasheed:

This is in reference to your letter of October 21, 1983 regarding possible amendments to the Cash Discount Act which would place oil and T&E companies in a similar position to that of credit card issuers such as national banks by allowing the imposition of "participation fees". You asked if dealers would still be charged for credit costs if oil companies were given the freedom to recover these costs directly from card users. You also expressed concern that oil companies might possibly recover credit costs twice, i.e., from card users and from dealers.

As you know, to further the objectives of the Cash Discount Act and to partially recover costs associated with a credit card, some oil companies with proprietary credit card programs have chosen a dealer service charge as a method of partially recovering the costs associated with a credit card program. Others have elected not to implement a dealer service charge and some have discontinued their credit card programs. Mobil is one of the companies which has a dealer service charge.

Whether Mobil elects to charge a participation fee or make other changes in its credit card program will depend upon future market developments both in the petroleum and credit card business as well as our individual judgment. While the proposed legislation would increase a card issuer's flexibility to recover its credit card costs, it does not authorize "double billing".

What each company elects to do regarding recovery of credit card costs will depend upon individual market judgment. At this time, we do not have any plans to discontinue our dealer service charge. Just as not all companies have opted for a service charge, it is probable that not all companies will utilize participation fees on card users. However, allowing companies the flexibility to choose the method they desire to recover credit card costs based on their assessment of the market should augment the long term viability of proprietary credit card programs.

Sincerely,

J. B. Hinton

/kmj
2886D

EXXON COMPANY, U.S.A.
POST OFFICE BOX [illegible] HOUSTON, TEXAS [illegible]

ATTACHMENT III

RECEIVED NOV 15 1983

MARKETING DEPARTMENT
RETAIL BUSINESS
[illegible]
MANAGER

November 11, 1983

Mr. Vic Rasheed
Executive Director
Service Station Dealers of America
Suite 303
2021 K Street, NW
Washington, DC 20006

Dear Mr. Rasheed:

Your letter was referred to me since I am responsible for Exxon's retail marketing business in the United States. We appreciate your interest, and that of the Service Station Dealers of America, in credit cost recovery legislation. As you are aware, the American Petroleum Institute and the National Oil Jobbers Council are jointly pursuing amendments to the Truth-in-Lending Act that, if adopted, would provide oil companies with additional methods of placing the cost of credit on the credit user.

Exxon will support the API/NOJC lobbying effort for a participation fee with the appropriate Federal preemption of applicable state laws. We continue to believe that all options for credit cost recovery, including a surcharge, should be available and the participation fee amendments are a step in that direction. In accordance with this belief, we will oppose any legislation to restrict or prohibit any method of recovery now in use, including merchant fees.

I'm sure you will understand that Exxon is unable to comment at this time on any future plans we may have.

Sincerely,

S. M. Pearman

SMP:DMS:cb

A DIVISION OF EXXON CORPORATION

ATTACHMENT IV

Amoco Oil Company
General Office
200 E. Randolph Drive
Chicago, Illinois 60601
312 856-5244

Sam G. Van Sickle
Vice President Marketing

November 15, 1983

RECEIVED NOV 1983

Mr. Vic Rasheed
Executive Director
Service Station Dealers of America
2021 K Street, N.W. - Suite 303
Washington, D.C. 20006

Dear Mr. Rasheed:

Amoco, like the Service Station Dealers of America, is most interested in the proposed legislation affecting the Truth in Lending Act which would serve to broaden the opportunities for both petroleum marketers and dealers to recover gasoline credit costs. It would certainly be premature for Amoco to take a position on what action it might take if the proposed legislation were adopted.

If such legislation is adopted, Amoco would certainly review its current policy on recovery of credit costs and would monitor changes in the marketplace that may result from any new legislation. Competition, marketplace activity, and the consumer will likely be factors having a greater influence on Amoco's credit card programs than any proposed legislative changes.

The important aspect of the proposed legislation, both for Amoco and for service station dealers and jobbers, is the fact that such legislation provides more flexibility for both the petroleum marketer and its dealers and jobbers.

Very truly yours,

S. G. Van Sickle

SSDA®
SERVICE STATION DEALERS OF AMERICA

ATTACHMENT V

2021 K STREET N W SUITE 303
WASHINGTON D C 20006
202/293-6868

VIC RASHEED
Executive Director

October 21, 1983

Mr. S. G. Van Sickle
Vice President, Marketing
Amoco Oil Company
200 E. Randolph Drive
Chicago, IL 60601

Dear Mr. Van Sickle:

The Service Station Dealers of America is most interested in proposed legislation which would broaden the opportunities for oil companies to recover the cost of credit from their card users.

We understand that this language has been reviewed by the American Petroleum Credit Association.

We are seeking further information on the effect this method of credit cost recovery might have on our members and their customers. Specifically we would like to know if dealers would still be charged for credit costs.

It appears that if oil companies are free to recover credit costs from card users, there would be the posibility of them recovering credit costs twice if dealers are also billed.

Therefore, before we endorse the proposed legislation, we would like to know if your company would forego the collection of credit costs from dealers, if given the freedom to recover these costs directly from card users.

Since we expect this issue to come before Congress in the near future, we would appreciate your early response to help us decide our position on this legislation.

Sincerely Yours,

Vic Rasheed

Vic Rasheed
Executive Director

VR:kl

OFFICERS

DON SKILLING, President, Mill Valley, CA
TRACY STANTON, First Vice President, Bexley, OH
DAVE WOODWARD, Second Vice President, Ft. Lauderdale, FL
EMMETT PROBUS, Third Vice President, Louisville, KY
TOM MARKOS, Treasurer, Mountainside, NJ
JERRY COHEN, Esq., General Counsel, Washington, DC

Senator GORTON. Mr. Chisholm and Mr. Larkins, why don't you comment on that last point? Why is it that the majors did not agree to the position of Mr. Rasheed's group?

PROHIBITION ON DUAL BILLING OF CONSUMERS AND DEALERS FOR CREDIT COSTS

Mr. LARKINS. Our position is all the options should be available and, as Mr. Rasheed has pointed out, different competitors do different things in the marketplace and we think that's healthy. We think people should be left to choose among the alternatives available. We certainly don't think competition would allow any company such as ours to charge an excessive amount for credit relative to its competitors. Credit costs would be regulated by the marketplace. We certainly didn't feel like our letter to Mr. Rasheed indicated what future actions we might anticipate.

Mr. CHISHOLM. I would basically agree with Mr. Larkins' statement. We are not totally comfortable with allowing the oil companies total flexibility in terms of recovering the cost of credit, but looking at it from a competitive economic standpoint, we think that competitive conditions would virtually eliminate their ability to double dip.

There were some allegations initially when they started doing the credit card processing fee that the oil companies would double dip, charging in the price of product and also charging the surcharge. And to us, the addition of the surcharge was a tacit acknowledgement by the oil companies that they could no longer recover the cost of credit in the price of the petroleum products they were selling and that they were having to do it through the surcharge. Our only problem with that was we had no other option; we had to recover the cost of credit; we couldn't pass it through with a surcharge. I think competitive conditions to a great degree limit the oil companies' ability—we believe it would limit to a great degree the oil companies' ability to double dip in that way.

Senator GORTON. I take it that none of the three of you agree with the testimony from some of the witnesses on the previous panel that it cost you as much to collect cash as to deal with a credit card?

Mr. LARKINS. I certainly wouldn't agree that it costs as much to collect cash; no, sir. I have indicated that Exxon's credit cost currently is about 4 to 6 cent per credit gallon. The merchant's fee charged to our retailers is less than that. So we are not recovering the full cost of credit through that mechanism today and the amount of the unrecovered cost is substantial.

CREDIT CARD FLOAT

Mr. CHISHOLM. I think from our standpoint—and I think Mr. Rasheed's numbers bear that out—that there's a credit card float. A lot of people collect credit cards and it takes time for them to get reimbursed. In terms of using the credit card there are a lot of other costs associated with credit cards that simply aren't there in the cost of cash.

CURRENT CASH DISCOUNT PROGRAMS CRITICIZED

Senator GORTON. Mr. Chisholm, you and Mr. Rasheed have criticized the current cash discount programs on the basis of different State regulation and difficulties to implement and the like, and yet it is quite clear that cash discounts are far more prevalent in gasoline retailing than they are in any other form of retailing.

I'd like you to comment on why it's become so widespread if it's so difficult, and ask you whether or not there are any States in the country—and if so, which ones—in which it is so difficult that there is simply no cash discount for gasoline?

Mr. CHISHOLM. I think one of the reasons that the Cash Discount Act is more prevalent in the petroleum industry is because of the history of the industry which I cited earlier. You had an industry where the cost of credit was always borne in the price of product and it wasn't separated out. It's only been in the last 2 or 3 years that they have been differentiated—the cost of credit versus the cost of petroleum products.

At that point it became a real struggle as to how you try to recover the cost of credit on the street and the Cash Discount Act was the only available mechanism and, as a result, many people are experimenting with the Cash Discount Act. But I can show you service stations within 15 miles of this hearing room which advertise the same low price, cash or credit, and offer a price that will meet the cash price of someone offering a discount for cash. And that doesn't make a lot of sense, but it's repeated all across the country.

To answer your second question, I do not know a particular State where it is so difficult that nobody is offering a discount for cash, but I know in New Jersey, for example, they require you to post the credit card price. I think they refused to allow you to sell both of them at the same meter. So I don't know of a particular State where no discount for cash is being offered. I know in some States it's far more difficult than others.

Senator GORTON. Mr. Rasheed, did you wish to comment on that question?

Mr. RASHEED. Well, I think a discount for cash is primarily pushed by the retailers because this is probably the most competitive single industry in the world. I think that the retailers really have very little choice about pushing discount for cash. They have to be competitive.

I think in our industry that we have to remember that our retailers are not, even though we argue with some of our suppliers about this, they are not really independent businessmen in every sense of the word. They are in fact captive customers of their oil company and they pretty much have to follow the oil company line. They have to pursue the programs that are put forward for them. Generally, they are put out in such a way that they have very little choice, and as far as discount for cash goes, I would say that it is not a matter of choice that dealers are pushing discount for cash at all. It's the fact they have very little choice, and the problem is that, as I said earlier, first of all, you need cash. You're making a very low margin of profit. Many of these self-serve cash-only islands that we see today the dealer is making perhaps 3 cents

a gallon. How can you pay a credit card fee for that? It's impossible. Yet he has to sell at that low price to be competitive. It's a situation that's being forced on him and he has very little choice but to go along with it. It's simple, as they say, to go with the flow, because in this case there's very little else he can do.

Senator GORTON. Bill.

FEDERAL RESERVE BOARD RECOMMENDATION

Senator PROXMIRE. Mr. Chisholm, as you know, this legislation has been renewed over and over again, banning surcharges. The Federal Reserve Board this morning told us that they recommend changes exempting surcharges from usury laws in the States and also from truth-in-lending up to 5 percent.

Would that recommended amendment resolve most of the problems of letting the surcharge expire, if we could put that into effect?

Mr. CHISHOLM. I think it would go a long way.

Senator PROXMIRE. You see, we can't settle this perfectly for you and I'm afraid if we postpone this it's going to be another postponement that's going to have to probably go over until next year because everything controversial is likely to take that form this year or might take that form this year. And I think that you're going to be in a position of having the surcharges banned many years to come.

Mr. CHISHOLM. I was not here when the Federal Reserve Board gave their presentation, but from what I understand they said essentially that you preempt the State laws allowing the surcharge to be passed through to a ceiling of 5 percent, and I think that that would go a long way to solving our problem.

I think we recognize the political difficulties in preempting all State usury laws and allowing no ceiling on interest rates or what that surcharge may be. The 5 percent, Mr. Larkins would be better able to address in terms of whether that was a reasonable ceiling or not, but that would go a long way to address the immediate concerns that we have.

Senator PROXMIRE. Mr. Larkins.

Mr. LARKINS. I think if you're suggesting, if I understood the question correctly, you're asking whether elimination of a surcharge prohibition with a 5-percent cap would go a long way toward resolving our problem.

Senator PROXMIRE. Only a 5-percent cap to the extent of being exempt from the State usury laws.

Mr. LARKINS. And preempting the State laws with respect to that charge. My response would be that we would like to see a broader range of alternatives available to the credit card issuers, including an annual fee for membership that could be uniform among the States, and a transaction fee if it was used in somewhat the same way that some banks use transaction fees on debit cards.

Senator PROXMIRE. Well, I realize you want more, but let me say, if you had the choice of settling for what the Federal Reserve Board has proposed, would you agree that we ought to let it expire or do you think we ought to fool around with an extension?

Mr. LARKINS. Well, I would agree that it's a step in the right direction, but not enough to really give the consumer and the credit card issuer the kind of alternatives that I believe are needed.

Senator PROXMIRE. I'm not sure I understand your answer. Your answer is you'd rather see us extend it?

Mr. LARKINS. No, I didn't say that. I wish you would consider the possibility——

Senator PROXMIRE. I know what you want, but if that's the option—we either extend it, probably period, or we end it with the Federal Reserve's recommendations. Those are the options.

Mr. LARKINS. As I indicated to you, it seems to me that's progress in the right direction but not as far as I hope you would see your way to go.

Senator PROXMIRE. Mr. Rasheed.

Mr. RASHEED. Well, I think that my answer would have to be very similar to the two gentlemen who responded. I think that our prime concern, however, is still who is actually going to do the billing for the surcharge and how would that be handled.

Senator PROXMIRE. Mr. Chisholm, while you and I share the Fed's view that cash discounts and credit surcharges are functional equivalents, you testified there are practical problems in implementing cash discount programs that may make them less desirable than credit surcharge programs.

Would you tell us a little more about the difficulties of implementing cash discount programs?

Mr. CHISHOLM. I think primarily the difficulties are that the gasoline industry is not set up to have a cash discount or a credit card surcharge program because they still have many facilities who may have one set of islands, who have to do both on the same pump. Their pumps aren't equipped to do that. It leads to consumer ripoffs, for lack of a better word, because you have the credit card price posted at the pump and he pays cash and forgets to ask for his discount and the attendant forgets to give him the discount and the difference is pocketed. It leads to confusion to the motorist driving down the street and he may see a half dozen different prices hung out on the sign and he has no idea which one he's paying at the time he makes the decision to purchase.

I think you have problems with State laws and people not understanding what they can do and it's different from State to State. I think all of those things are very critical for either a Cash Discount Act or a surcharge.

MOTORIST CONFUSION

And to follow up what Mr. Rasheed said earlier, our preference, in addition with going along with perhaps an extension of the surcharge preempting State laws, would be that the surcharge not necessarily have to be applied at point of sale, and that the credit card issuer could advise the credit card holder through full disclosure that, yes, you will be assessed a percentage fee over and above what you pay for the product on your credit card as a cost of the credit with the Fed ceiling still applicable to that situation, but it would be posted on the invoice rather than at the point of sale be-

cause when you do it at the point of sale, be it cash discount or surcharge, it's going to lead to motorist confusion.

Senator PROXMIRE. Now the Fed study suggested that few retailers are interested in using the credit surcharge program and yet your testimony implies the opposite. If we lifted the ban on credit surcharges, do you think gasoline retailers would use that approach?

Mr. CHISHOLM. I think that if you lifted the ban on credit card surcharges and the oil companies continued to pass through the surcharge to them, I think you would see many retailers and marketers doing credit card surcharges. But again I would caution you that from the consumer standpoint they would do what is quite natural in any instance, they would be posting the cash price and after they draw people into the station they would be tacking the surcharge on top of that. That's why our preference would be full disclosure to the credit card holder at the invoice and billing him on top of that.

Senator PROXMIRE. Wouldn't it take the general motoring public about a month to get on to that? Wouldn't they get on to that in a hurry? If you find out every time you go in you're charged for using a credit card, it wouldn't take long for that to get communicated. People aren't stupid.

Mr. CHISHOLM. People aren't stupid, but they would have no way of knowing what stations are doing it and what stations weren't. They don't have any idea in terms of pulling into the station whether they're going to be charged for a credit card or not unless it was the same station they shopped at every week. But on an interstate highway or in transit a motorist pulling into a station has no idea whether they are going to be assessed that extra charge or not.

Senator PROXMIRE. Mr. Larkins, if we're able to end the discrimination of prohibition on credit surcharges at point of sale but not by credit card issuers, would you support such a change?.

Mr. LARKINS. I think my answer would be the same as before. I think it's in the right direction, but I would like to see more.

Senator PROXMIRE. You favor that particular change, however, in addition to others?

Mr. LARKINS. Along with others.

Senator PROXMIRE. As do you, Mr. Chisholm?

Mr. CHISHOLM. I'm sorry, Senator.

Senator PROXMIRE. If we end the discrimination of prohibition on credit surcharges at the point of sale but not by credit card issuers——

Mr. CHISHOLM. Again, that would be a step in the right direction.

Senator PROXMIRE. Mr. Rasheed.

Mr. RASHEED. I would very much favor that.

Mr. LARKINS. Senator, could I add that I think the kind of problems that these gentlemen are talking about, though complications for the retailer, would not be solved by that sort of action. Exxon has been among the leaders in putting a discount for cash program in the market. We tested it in the early seventies under controls. We tested it again in 1982 as soon as the controls were lifted and we implemented it in September and Congress allowed us to do this. We think it's very important that the cost of credit be seen by

the retailer so he can make his decision and he not buy gasoline with credit included. Then it's his decision whether he wants to charge two prices to his customers or whether he wants to charge one price for with and without credit. That's still a choice he has and I don't think he's forced to do any one thing as Mr. Rasheed implied.

Senator PROXMIRE. I think that's a good statement.

Mr. CHISHOLM. I think we would agree with that, but we think the consumer ought to have the same privilege and that the consumer ought to see what the cost of credit is.

Senator PROXMIRE. I understood Mr. Larkins to say that.

Mr. CHISHOLM. He's saying the cost to the retailer.

Mr. LARKINS. The cost to the retailer, he has the choice of passing along the discount for cash or not.

Senator PROXMIRE. Would you disagree that the consumer should also be informed?

Mr. LARKINS. I think he should be informed.

Mr. CHISHOLM. That's why we would maintain that the best way to inform the consumer is for the credit card issuer to advise that when you use this card, whatever the cost is there's going to be 3 or 4 percent tacked on to it.

Mr. LARKINS. He's saying a transaction fee would be better from his point of view and I'm saying that we would like to see that option available also, but I'm not suggesting, speaking for Exxon, we would elect to change from a discount program to anything else.

Senator PROXMIRE. Thank you, Mr. Chairman.

Senator GORTON. Thank you, Senator. Thank you all very much for being here. This hearing is adjourned.

[Whereupon, at 12:20 p.m., the hearing was adjourned.]

[Additional material supplied for the record follows:]

STATEMENT OF THE
AMERICAN RETAIL FEDERATION
FOR THE RECORD
IN HEARINGS BEFORE THE
SUBCOMMITTEE ON CONSUMER AFFAIRS
OF THE COMMITTEE ON BANKING,
HOUSING, AND URBAN AFFAIRS
UNITED STATES SENATE

ON

H.R.4278

TEMPORARY EXTENSION OF

BAN ON CREDIT CARD SURCHARGES

February 7, 1984

Washington, D.C.

The American Retail Federation (ARF) is taking this opportunity to present for the record its views, comments, and suggestions regarding H.R.4278, the bill passed by the House of Representatives at the end of the first session of this Congress, that would extend until July 31, 1984, the ban on credit card surcharges. That ban currently is scheduled to expire on February 27, 1984.

ARF is grateful to the Subcommittee and its staff for this opportunity to make known its views on this important legislation, particularly in view of the fact that the retail industry was not given the opportunity to testify or comment on the bill before it went to the House floor.

Membership in ARF consists of 31 national retail trade associations, 50 state retail associations, the Greater Washington Board of Trade, as well as corporate members. Through its members, ARF represents more than one million retail establishments.

The majority of retailers represented through ARF either offer their own credit plans (for which a credit card typically is issued) or honor credit cards of third-party card issuers, such as Visa and MasterCard. Some do both. For that reason, ARF is vitally interested in this legislation. By regulating (i.e., prohibiting) a surcharge for the use of a credit card, it would directly affect the price of credit and, as a result, indirectly affect its availability.

In principle, ARF believes that natural marketplace forces should determine both the level and the structure of the price for which credit is offered. Congress must be in substantial agreement with that principle, because in 1981 it lifted the five percent ceiling on discounts for cash (in lieu of a credit card) that may be excluded from the finance charge disclosed under Truth in Lending (Public Law 97-25, July 27, 1981). Thus, natural market forces, and not esoteric disclosure requirements, now set the amount (percentage) of discount offered for cash.

There is no functional difference between a surcharge for the use of a credit card and a discount for use of cash (or check or similar means of payment) in lieu of a credit card. Both involve a two-tier pricing system in which the cash buyer ultimately pays less for the same merchandise than does the credit buyer.

The only result of the current unequal treatment of surcharges and discounts is that it singles out one group of merchants -- those that price their goods and services for the cash market (e.g., food supermarkets) -- and effectively cuts them out of participation in the credit card market. It does not affect anyone else.

ARF believes that all merchants should be given an equal opportunity to participate in the consumer credit marketplace. For that reason, the Federation believes that the ban on surcharges ultimately should be allowed to expire. However, we

support a five-month extension as proposed in H.R.4278, provided Congress uses the time to resolve the troubling issues (such as finance charge and rate disclosure, rate ceilings, and consumer notification) that will accompany termination.

With respect to discounts, Congress resolved one of the troublesome issues simply by providing in §167(b) of the Truth in Lending Act (15 U.S.C. §1666f(b)) that discounts for cash in lieu of using an open end credit plan or a credit card do not constitute a "finance charge" for Truth in Lending purposes. In §171(c) of the act (15 U.S.C. §1666j(c)), Congress solved another thorny problem by providing that discounts offered pursuant to the Truth in Lending Act are not a finance charge or other charge for credit under any state usury law or law regulating the types, amounts, or rates of charges. These or similar provisions must be made to apply to surcharges when the ban expires; otherwise, the non-truth in lending impediments to imposing a surcharge will prevent its use.

The American Retail Federation will be delighted to appoint a committee of retailers to work with the Subcommittee's staff to resolve these or other issues that may arise. The bottom line is, however, that these issues simply must be addressed, and we urge the Subcommittee to address them during the five-month extension period.

ARF is grateful for the opportunity to present its views. The Federation will be delighted to respond to any questions the Subcommittee may have.

31-956 O—84——19

CONCERNED CONSUMERS LEAGUE, INC.
CONSUMER EDUCATION AND PROTECTION

614 WEST NATIONAL AVENUE MILWAUKEE, WISCONSIN 53204 PHONE: (414) 645-1808

January 12, 1984

The Honorable William Proxmire
United States Senate
Home Office
344 Federal Courts Building
517 East Wisconsin Avenue
Milwaukee, WI 53202

Dear Senator Proxmire:

Re: Support for your position on Credit Surcharge Legislation

I am writing on behalf of the Concerned Consumers League (CCL), the oldest community-based self-help consumer organization in Milwaukee. Our constituency is broad-based, but primarily includes low-income consumers, Hispanics, Blacks, students and senior citizens in the counties of Milwaukee, Waukesha, Ozaukee, Washington, Racine and Kenosha. Additionally, CCL represents its members on more than ten national, state and local organization boards of directors, including the Consumer Federation of America.

We trust you are familiar with us because we presented you with an award for your voting record in the consumer interest last year.

We concur with your position on credit surcharges as spelled out well in the Direct Sellers Association Foundation "At Home With Consumers" publication. Credit consumers -- not cash-paying consumers -- should pay for the privilege of using credit.

However, we are concerned that it would <u>not</u> be in the best interest of any consumers for the ban on credit surcharges to end abruptly at the end of next month -- consumer fraud, bait and switch advertising, and general marketplace confusion are inevitable.

Therefore, we urge you to work for a temporary extension of the ban...six months to a year should suffice. During this time we pledge to work with you to help educate the public, merchants, local consumer agencies and the media about the change in policy and, thereby, insure a smooth transition from discounts for cash to surcharges for credit.

Your well-earned reputation as a protector of consumer rights and fighter for consumer disclosure -- from Truth-in-Lending to Fair Credit Reporting -- makes you the best hope that the consumer has for advocating this change in public policy while assuring adequate disclosure and protection to the consumer.

Consumer representatives from our organization and the Wisconsin Consumers League and the Wisconsin Attorney General's Office are eager to meet with you to discuss this at your earliest convenience.

Thank you.

Sincerely,

A.L. Luzi

Al Luzi
Executive Director

WCL

TO: U.S. Senator [illegible] Proxmire

FROM: Jim Brown
Wisconsin Consumers League

DATE: January 10, 1984

SUBJECT: Credit Surcharge Legislation

The Wisconsin Consumers League is concerned that if the ban on credit card surcharges is allowed to expire next month -- without appropriate planning and education steps being taken -- credit and cash paying consumers could end up paying more for goods and services and could be victimized by merchants who levy surcharges without properly disclosing them to consumers.

The League has not taken a position on whether or not surcharges should ultimately be allowed; we have members on both sides of the issue. Frankly, we feel the difference between "credit surcharge" and "cash discount" is one of semantics -- if appropriate disclosures are made and consumers are aware of their choices.

In order to assure adequate disclosure to consumers, we urge you to vote for an extension of the ban. We don't know if six months is a long enough transition period; we suspect is is not, given that this is an election year.

The league is eager to work with you during the extension to:

1. Plan a regulatory framework for disclosure of surcharges to consumers. We understand that remedial legislation is needed to establish such guidelines and possibly to ammend Truth-in-Lending.

2. Review the impact on Wisconsin laws to determine if legislative regulatory change is needed at the state level; for example:

   - What is the impact on the Wisconsin Consumer Act?
   - What are the implications in regard to the lifting of the state usury ceiling currently scheduled for November 1, 1984?
   - Should there be coordination with the Wisconsin Comparison Price Advertising Code and minimum mark-up laws?

3. Conduct a consumer education program through the Wisconsin Consumers League, other consumer organizations, consumer protection agencies and the media. While this does not appear to be a "burning" consumer issue at this point, it could become one if consumers are not informed and prepared for a change.

We have contacted your office to request a meeting with you to discuss our concerns and to determine how we can work together on behalf of the Wisconsin consumers we both serve.

National Retail Merchants Association

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STATEMENT FOR THE RECORD

OF

NATIONAL RETAIL MERCHANTS ASSOCIATION

BEFORE THE

COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS
UNITED STATES SENATE

HEARING ON CREDIT CARD SURCHARGES

February 29, 1984

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The National Retail Merchants Association (NRMA) is pleased to submit this Statement for the record in connection with this Committee's deliberations on credit card surcharges.

NRMA is the nation's largest trade association for the general merchandise retail industry. NRMA's members operate approximately 40,000 stores in the United States, distributing in excess of $175 billion annually in goods and services to the American consumer. NRMA's members range in size from the largest chain and department stores and mass merchandisers to small specialty shops and independents.

Virtually all of NRMA's members extend credit by means of their own proprietary credit card systems or by accepting third-party credit cards, and some members offer both alternatives to their customers.

On February 22, 1984, the Senate Banking Committee passed a bill to extend the ban on surcharges until May 15, 1984 and at the same time passed a Committee Print that would remove the ban on surcharges and treat "differences in price" of 5 percent or less as exempt from state usury laws. Under the Committee Print such differences in price are also excluded from treatment as a finance charge under the Truth-in-Lending Act. NRMA endorses the Committee Print.

In view of the fact that over 50 percent of our members' sales are made by means of credit cards, the issue of the legality of imposing a surcharge for the use of credit cards is an extremely important issue for retailers. A surcharge for credit is potentially a viable pricing mechanism. Unlike discounts for cash, as a practical matter, a surcharge for credit is a realistic possibility for many merchants. On the other hand, discounts for cash present substantial administrative obstacles at the point-of-sale. This is one of the principal reasons why discounts for cash have received comparatively little acceptance by retailers, with the notable exception of operators of gas stations. Only about 6 percent of retailers other than gas station operators offer such discounts, according to the Federal Reserve Board's recent credit card study.

NRMA did not oppose legislation passed by the House on November 16, 1983 (H.R. 4278), which would extend the current ban on surcharges until July 31, 1984. Now, however, we are convinced that the approach of the Committee Print is the best solution. After considering the divergent views of consumers (at least as consumers' views are purported to be represented by the Consumer Federation of America), third-party credit card issuers, and businesses that accept such cards, and others such as the Federal Reserve Board, the

Senate Banking Committee has achieved a fair balance. Even though excluding from the finance charge and from disclosure under the Truth-in-Lending Act only surcharges and discounts of 5% or less effectively would eliminate any surcharges or discounts in excess of that amount, this approach is preferable to a continued ban on surcharges.

Until now, most retailers have not considered the issue of two-tier pricing to be very significant, essentially because surcharges have been illegal and, as noted, discounts for cash have been impractical. The bookkeeping and other logistical problems involved with returning part of the cash price to the cash customer, along with the confusion this could cause on the sales floor, has militated against offering discounts for cash. This does not mean that surcharges would suddenly become commonplace if the ban is removed. Even if the impediments attributable to disclosure requirements under Truth-in-Lending and state finance charge ceilings are removed, imposition of a surcharge is highly unlikely in the context of a merchant's proprietary card. In the case of the merchant's acceptance of third-party cards, the imposition of a surcharge will be given consideration by retailers who are concerned about their cash customers subsidizing the cost of credit but have been reluctant to offer a discount for cash. Further, many of the retailers

and gas station operators who in the past have offered discounts for cash are likely to switch to the surcharge method of two-tier pricing and abandon the discount for cash approach entirely.

Thus, a subject that in the past has largely been irrelevant for retailers now is important. We recognize that surcharges could play a significant role in the economics of extending credit for thousands of merchants, from large chains to small specialty shops, and thousands of others such as restaurants and hotels. Virtually every business that accepts third-party credit cards and pays the "merchant discount" will for the first time at least consider the merits of passing that cost on to the customer to whom that cost can be directly attributed. There is another consequence of removing the ban. If debit cards are ultimately priced as we believe they should be -- on a per transaction basis instead of a merchant discount basis -- removing the ban on surcharges for credit card use could be the single most positive influential factor for debit cards to date. Retailers will be able to accept debit cards at full value, which they want to do because debit cards are considered an alternative to accepting currency or checks, while possibly placing a surcharge upon credit cards.

NRMA thus supports lifting the ban on surcharges. We see no basis for distinguishing, from an economic or legal standpoint, between discounts for cash and surcharges for credit. They are functionally the same. Admittedly, both types of two-tier pricing can produce confusion on the part of consumers and there is the potential for abuse on the part of a few unscrupulous entrepreneurs who fail to comply with the requirement to disclose the existence of a surcharge before the customer makes the decision to make a purchase. In spite of this, limiting the marketplace to one type of two-tier pricing system should not be perpetuated.

As the Board has pointed out, there is a cost attributable to credit card financing which is not at the present time being allocated fully to the users of credit cards. While the amount of the subsidy that is paid by cash customers is disputed by issuers of third-party cards, we are convinced -- and the Board's study is corroborative -- that the cost of both proprietary and third-party credit card systems is not offset by the revenue derived from those consumers who use those systems. Many who use credit cards are convenience users who pay nothing to use the merchant's proprietary card plan (fees are rarely if ever imposed on merchants' own cards) or pay only an annual fee and sometimes no fee to use third-party systems. Study after study over

the years has documented the fact that the finance charge revenue available to the merchant is insufficient to pay the tremendous costs of operating a proprietary system. Similarly, when the merchant accepts third-party cards these costs are either absorbed to reduce profits or are passed on in the cash price of the goods and services, to be shared by both cash and credit card customers. The argument that in fact the merchant's cash price is "pure" -- it excludes the costs incident to operating the in-house credit facility or paying the "merchant discount" imposed by third-party card issuers -- because of the increased volume attributable to credit card sales, still has not been documented. While it cannot be denied that there are some incremental sales attributable to accepting credit cards, all available data, including the Board's recent study, indicates that for many merchants this is not sufficient to eliminate a subsidy by cash buyers.

NRMA believes that merchants and others should not be restricted in the way in which they price their goods. There is no public policy justification for limiting merchants to recouping the additional expense of third-party credit cards by the sole means of a discount for cash. It has been demonstrated that this mechanism is simply not a realistic alternative for most merchants. On the other hand,

a surcharge might be. The key question is whether there is an overriding need to restrict the marketplace in this way. The answer is that there is no such need.

The advocates of the ban have not offered compelling reasons to justify its continuation. Their position is that if merchants want to recoup their credit card expenses, there is a mechanism (discounts for cash) available to the merchant. The fact that discounts are difficult to administer and impractical to implement is of no concern to those who oppose surcharges. They also cite the problems that might arise concerning potential confusion on the part of the consumer or potential abuses on the part of those imposing surcharges. The answer is that these problems are addressed in the Committee Print and any needed refinements can be developed in the Board's implementing regulations. For example, a business should be required to clearly disclose the existence of a surcharge (such as by indicating such in connection with the third-party card logo) before the consumer makes his or her decision to purchase goods or services, rather than only at the time of payment. These concerns have been resolved satisfactorily in the case of discounts for cash and we are confident the Board will deal with them effectively in the context of surcharges for credit.

In summary, while we do not oppose extending the ban on surcharges for a short period, it is essential that this issue be carefully examined now and that a final resolution be achieved. This should be done with as much expedition as possible because failure to act has the effect of continuing the ban. This is because the point-of-sale disclosure requirements under Regulation Z and the fact that the surcharge would be a finance charge for purposes of state law should effectively prevent their implementation. Thus, we urge Congress to promptly resolve this issue once and for all by removing this restriction on the ability of merchants and others to allocate the cost of credit in a way that is best calculated to avoid a subsidy by cash purchasers. This would leave the Truth-in-Lending Act intact to insure adequate disclosure of the cost of credit, with a specific and carefully delineated exception for certain point-of-sale discounts for cash and surcharges for credit.

NRMA appreciates the opportunity to present the views of its members on this important issue.